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## WHITHER AND WHETHER ADJUDICATION?

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### INTRODUCTION

Participants in this symposium have been asked to look forward and consider what shape adjudication will take in the century that has just begun. To do so, we need to look back to what the twentieth century produced by way of adjudicatory possibilities. In this brief Essay, I sketch (in part through a few charts and photographs) how adjudication has changed over the past one hundred years.

Adjudication is an ancient practice, long predating the founding of the United States. But only in the twentieth century did adjudication become a requisite aspect of successful, market-based economies. During the course of that century, democratic principles of equality insisted on the dignity of all persons. An array of individuals became eligible to bring claims into courts, and both public and private providers became accountable through adjudication to explain a variety of their decisions.

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\* Copyright, 2006, for the Essay and charts, Judith Resnik. This Essay is adapted from remarks delivered on April 21, 2006, for a panel on “Changing Times, Changing Roles?” at a symposium sponsored by the Boston University School of Law on “The Role of the Judge in the Twenty-First Century.” This commentary builds on Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173 (2004), and Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521 (2006). Additional discussion of issues explored here will be in JUDITH RESNIK & DENNIS E. CURTIS, REPRESENTING JUSTICE: FROM RENAISSANCE ICONOGRAPHY TO TWENTY-FIRST CENTURY COURTS (forthcoming 2007). Thanks are due to Denny Curtis, Celeste Bremer, Janice Dinkel, Bryan Garth, Patrick Higginbotham, Peter Jaszi, David Nimmer, David Noce, Christina Snyder, and Douglas Woodlock; to workshop participants at Boston University and Southwestern University; to many talented students for their research assistance, including Laurie Ball, Lauren Coppola, Kate Desormeau, Naima Farrell, Hannah Hubler, Marin Levy, Phu Nguyen, Natalie Ram, Bertrall Ross, Jacob Scott, Emily Teplin, Alana Tucker, and Aaron Weiss; and to Camilla Tubbs, whose work as a law librarian has made accessible a range of difficult-to-find sources.

In the United States, national groups of lawyers who were supported by leading judges and academics pressed Congress to create new statutory rights, to endow federal courts with authority over such claims, and to augment judicial resources. The growth in statutory mandates, the power of federal law to preempt state lawmaking, and the protections accorded life-tenured judges by Article III of the U.S. Constitution made the federal courts an attractive venue for litigants aiming to establish or to preserve principles of law.<sup>1</sup> That increased reliance on the federal system resulted in its expansion as well as in efforts to diversify adjudicatory opportunities by using agencies and by reformulating the procedural rules of courts. Some litigants were routed to the life-tenured judiciary, increasingly interested in settling cases, and others were sent to administrative agencies, once celebrated for their simpler process but more recently a focus of concern about their deficient process.

Some celebrated the widening aegis of adjudication, while others objected to the broadening role of courts, as they struggled to respond to the many demands placed on them. The unwillingness or inability to generate popular constituencies sufficient to support the financing of access to high-quality adjudication for eligible claimants, coupled with opposition from those questioning the desirability of widespread opportunities to bring lawsuits, resulted in the revamping of doctrines and rules, both procedural and substantive.

During the past thirty years, adjudication's reach has been constrained – in part through requiring alternatives and in part by devolving much of the work of courts to administrative agencies and private providers. Thus, accounts of adjudication during the twentieth century must simultaneously record adjudication's expansion as well as its constriction through delegation and privatization.

What is lost when litigation opportunities narrow? What adjudication offers to democratic governance are occasions to observe the exercise of state authority and to participate, episodically, in norm generation – occurring through a haphazard process in which vivid sets of alleged harms make their way into public purview. Adjudication is not necessarily an ideal mechanism for social policymaking, but it does serve to disseminate information about the imposition of state power and to legitimate that power. Adjudication's public dimensions also enable a diverse audience to see the effects of the application of law in many specific situations. As various sectors of the public gain insight into law's obligations and remedies, reaffirmation of those precepts occurs, or pressures emerge for judges and legislators to expand or to constrict extant rules.

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<sup>1</sup> As one Supreme Court Justice put it, the life tenure system was “one of our proudest [constitutional] boasts.” *See* *Palmore v. United States*, 411 U.S. 389, 412 (1973) (Douglas, J., dissenting) (raising Article III objections to the reorganization of the courts of the District of Columbia).

The literal and material presence of adjudication stems in part from its performative qualities: much of the activity occurs in buildings open to the public. In earlier centuries, judgments were rendered in town squares or other outdoor arenas.<sup>2</sup> But in more recent times, thousands of courthouses have been constructed. These “purpose-built” structures,<sup>3</sup> designed specifically to accommodate trials, have welcomed members of local communities as audiences to their proceedings. Open courthouses enable the state to display its ability to keep the peace by enforcing its laws. Through public access, certain trials gain high profiles and supply narratives to be shared and debated by a heterogeneous citizenry.

Courthouses are familiar features of local landscapes. Using stone and brick (chosen to safeguard the records produced through law), public leaders aim to make impressive statements about their demonstrated power to maintain law and order. Yet, because of shifts in practices, detailed below, adjudication’s public dimensions are at risk. As court-based processes focus on facilitating settlements, and as courts outsource their evidentiary work to administrative agencies and private dispute resolution providers, the power and effects of decision making become less readily accessible. Given the proliferation of the sites of adjudication and the pressures to seek alternative forms of resolution, I am not confident that adjudication will be as available one hundred years hence as it is today, nor that its substitutes will permit easy public observation and public knowledge of the deployment of power, both public and private.

### I. THE FLOWERING OF ADJUDICATION

As my exemplar, I use data from the federal system. Although representing only a small fraction of the courts and cases within the United States, the federal courts span the nation and enable insight into trends and challenges across the country. The chart below, Article III Authorized Judgeships, makes a first point by illustrating the dramatic expansion of federal adjudicatory capacity during the twentieth century.

As is depicted, in 1901, some one hundred judges worked in the federal system, at all levels.<sup>4</sup> That relatively small cohort dealt with a similarly small docket – of about 30,000 cases at the trial level and about 1100 appeals.<sup>5</sup> In general, these federal judges, dispersed around the United States, used the rules

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<sup>2</sup> See CLARE GRAHAM, *ORDERING LAW: THE ARCHITECTURAL AND SOCIAL HISTORY OF THE ENGLISH LAW COURT TO 1914*, at 9-10 (2003).

<sup>3</sup> That term is used in some of the literature on courts as public spaces. See, e.g., *id.* at 315.

<sup>4</sup> Details of the choices for such accountings can be found in Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 612 n.4 (2002) [hereinafter Resnik, *Inventing the District Courts*].

<sup>5</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 391 tbl.A.2 (1996) (indicating 1160 appeals and 33,376 criminal and civil filings in 1904).

of the states in which they sat, and they had little means of communicating with each other. The Department of Justice was their voice in Congress for budgets and supplies. As William Howard Taft famously put it, each judge was left “to paddle his own canoe.”<sup>6</sup>

### Article III Authorized Judgeships: District, Circuit, and Supreme Courts: 1901, 1950, and 2001

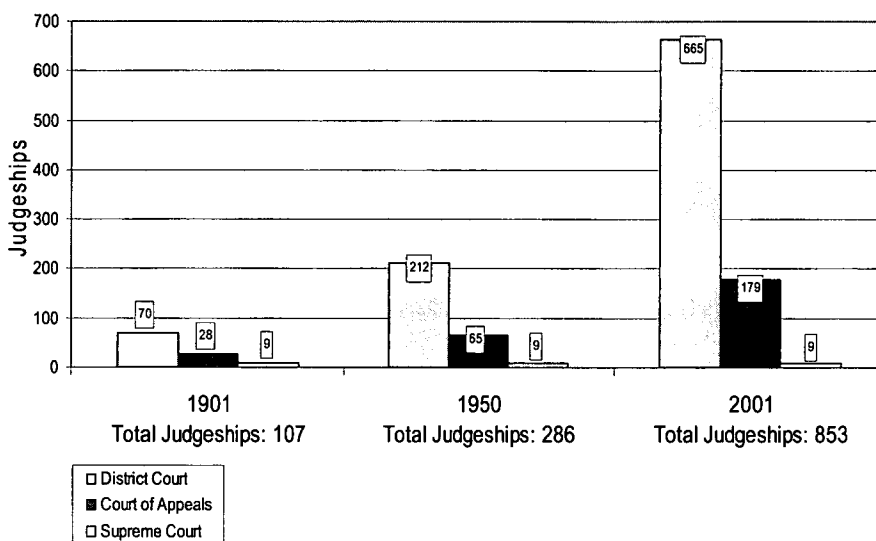


Figure 1

This chart also shows the growth in federal judgeships over the twentieth century. By 2001, Congress had created about 850 trial-level, life-tenured judgeships, which represents more than a sevenfold increase over what had been available one hundred years earlier. That group of judges, assisted by others, worked on about 320,000 cases and about 56,000 appeals.<sup>7</sup>

<sup>6</sup> William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 602 (1922).

<sup>7</sup> See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2001, at 23 tbl.B, 38 tbl.C, 59 tbl.D (2001) [hereinafter FEDERAL JUDICIAL STATISTICS 2001], available at <http://www.uscourts.gov/caseload2001/contents.html>. In practice, because life-tenured judges can take “senior” status and continue to work, several hundred more judges currently help to staff the federal courts, as do other kinds of judges, discussed *infra* notes 48-62 and accompanying text.

The increase in life-tenured judgeships came in response to congressional authorization of opportunities for more individuals to seek redress in the federal courts. Working in cooperation with the judiciary, Congress not only placed new demands on the courts but also augmented the staff of the courts. Remembering this facet of the relationship between the federal judiciary and Congress is important given that, in recent years, Congress has threatened and, upon occasion, acted to withdraw or “strip” jurisdiction from the federal courts. The image of a predatory Congress, unduly eager to superintend the federal courts, is predicated on enactments during the 1990s of legislation limiting access for prisoners and immigrants and imposing constraints on federal judges’ sentencing authority.<sup>8</sup> In the fall of 2006, in the Military Commissions Act, Congress again attempted to limit jurisdiction by enacting provisions constraining access of detainees raising claims about violation of the Geneva Conventions and other rights.<sup>9</sup> As of this writing, another proposal for congressional oversight of judiciary activities has been introduced; suggested is the creation of an “Inspector General” with powers to investigate judges.<sup>10</sup>

While tensions between the branches of the federal government are longstanding and today appear particularly acute, one must also understand the degree of cooperation that has existed. Members of Congress have worked

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<sup>8</sup> See, e.g., PROTECT Act, Pub. L. No. 108-21, § 401(b), 117 Stat. 650, 668 (2003) (codified in relevant part at 18 U.S.C. § 3553(b)(2) (Supp. IV 2004)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 803-804, 110 Stat. 1321-66, 1321-70 to -75 (1996) (codified as amended at 28 U.S.C. § 1915; 42 U.S.C. § 1997 (2000)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.). Section 401(b) of the PROTECT Act is also known as the “Feeney Amendment,” after its legislative sponsor. The Supreme Court interpreted some of these mandates in *United States v. Booker*, 543 U.S. 220 (2005).

<sup>9</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. §§ 948a et seq.; 28 U.S.C. § 2241). Efforts to limit access to courts can be found at Section 3 (Military Commissions), Section 5 (Treaty Obligations Not Establishing Grounds for Certain Claims), Section 6 (Implementation of Treaty Obligations), and Section 7 (Habeas Corpus Matters). Challenges to the constitutionality and reach of the Military Commissions Act are pending.

<sup>10</sup> See Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong. (2006). The bill calls for the Chief Justice, “after consultation with the majority and minority leaders of the Senate” and House of Representatives, to appoint a person to head an Office of Inspector General charged with conducting investigations into “possible misconduct” of judges so as to “prevent and detect waste, fraud, and abuse,” and to report annually to both the Chief Justice and Congress. *Id.* § 2(a). The Office would be given subpoena powers. *Id.* The leadership of the federal judiciary has objected. See *House Bill Would Impose Inspector General on Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, D.C.), July 2006, at 1, available at <http://www.uscourts.gov/ttb/07-06/bill/index.html>.

over many decades with lawyers and judges as co-venturers in creating the now-familiar institution of “The Federal Courts.” In the aftermath of the Civil War, Congress sought to expand its own reach and entrench national power; it did so in part by creating new federal rights. Through legislation in the 1870s that created general federal question jurisdiction,<sup>11</sup> expanded habeas jurisdiction,<sup>12</sup> and promulgated the famous civil rights statutes,<sup>13</sup> and then two decades later through the market-focused provisions of the Sherman Antitrust Act of 1890,<sup>14</sup> Congress began a pattern of reliance on the federal courts as instruments for enforcement of federal norms. During the twentieth century, Congress elaborated that pattern by enacting hundreds of federal rights enforced through the federal courts.<sup>15</sup>

One of the techniques for building a “federal presence”<sup>16</sup> was through constructing federal buildings around the United States. The next image, which depicts a federal courthouse built in Grand Forks, North Dakota in 1906, is such an example.<sup>17</sup> Between 1852 and 1939, the Treasury Department, through its Office of the Supervising Architect, oversaw a myriad of federal building projects.<sup>18</sup> One can learn a great deal about those projects from an

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<sup>11</sup> See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (2000)).

<sup>12</sup> See Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2241 (2000)).

<sup>13</sup> See, e.g., Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981, 1983, 1985 (2000)).

<sup>14</sup> Ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (2000)).

<sup>15</sup> For example, between 1974 and 1998, Congress created more than 470 new federal causes of action. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 956 (2000) [hereinafter Resnik, *Trial as Error*] (citing Admin. Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (Sept. 18, 1998) (memorandum) (on file with the Harvard Law School Library)).

<sup>16</sup> This phrase comes from the title of a book. LOIS CRAIG, *THE FEDERAL PRESENCE: ARCHITECTURE, POLITICS, AND SYMBOLS IN UNITED STATES GOVERNMENT BUILDING* (1978).

<sup>17</sup> The photograph in Figure 2, taken by Steve Silverman, is reproduced with his permission and that of the building's Property Manager Bryan Sayler. Assistance in obtaining this image came from the Honorable Celeste Bremer, Magistrate District Judge, Southern District of Iowa, and from Janice Dinkel, Judiciary Regional Account Manager, Public Buildings Service, GSA Rocky Mountain Region.

<sup>18</sup> The Treasury Department established the position of “Architect” in 1836. See U.S. Dep’t of the Treasury, Important Events in Treasury History in July, <http://www.treas.gov/education/history/events/07-jul.shtml> (last visited Dec. 1, 2006). In 1853, the Department created an Office of Supervising Architect, which oversaw federal building construction through 1939. See U.S. Dep’t of the Treasury, Important Events in Treasury History in December, <http://www.treas.gov/education/history/events/12-dec.shtml> (last visited Dec. 1, 2006). See generally ANTOINETTE J. LEE, *ARCHITECTS TO THE NATION: THE RISE AND DECLINE OF THE SUPERVISING ARCHITECT’S OFFICE* (2000).

exhibit on historic courthouses, mounted by the Federal Judicial Center (FJC), which was chartered in the late 1960s to augment the federal judiciary's capacity for research and education.

As the FJC explains:

Often combining the functions of courthouse, customhouse, and post office, these structures helped to extend the authority of the federal government to every region of the country. Newly-settled towns vied with large cities for the placement of federal offices that would make their communities administrative and commercial centers. The handsome buildings in turn offered prestige to the federal courts, which previously had met in an assortment of state offices and rented buildings.<sup>19</sup>

### Federal Courthouse Building, Grand Forks, North Dakota



Architect: James Knox Taylor (1906)

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Figure 2

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<sup>19</sup> Fed. Judicial Ctr., Historic Courthouse Photograph Exhibit, [http://www.fjc.gov/history/home.nsf/courthouses\\_frm](http://www.fjc.gov/history/home.nsf/courthouses_frm) (last visited Dec. 1, 2006).

The courthouse depicted in Figure 2, when augmented by dozens of others built during the twentieth century, brings me to a second point. Adjudication predates the birth of America and of democracies more generally. Indeed, some elements of adjudication (evenhanded treatment of disputants, decision making predicated on facts and constrained by obligations to be obedient to law, and the public performance of the rendering of judgments) influenced ideas about democratic governance long before the United States existed.

The development of democracy, however, has changed the needs for, access to, and modes of adjudication. The rising numbers of federal judges (depicted in Figure 1) and the building of new courthouses (exemplified by the 1906 courthouse in Figure 2) were part of a broad response to changing normative commitments within democracies that made the prospect of adjudication plausible for whole new sets of claimants.

During the twentieth century, the state came to be understood as itself subject to regulation, bound by its own rules, and obliged to treat persons with dignity and respect. Individuals gained the right to use litigation to call state officials to account and to hold government to its own promises.<sup>20</sup> Further, in part through new information technologies, injuries experienced by large numbers of individuals, once seen as individualized and isolated events, became visible as patterns of connected events. The growth of the profession of lawyers provided the personnel to generate regulations and responses to aggregate forms of injury.<sup>21</sup>

Yet another factor, one that has been under-appreciated in the literature of courts, is women's rights. Women only gained a juridical voice in the last century, and the radical transnational reconception of women as rights holders,<sup>22</sup> both in and outside of their families, has driven up the volume of disputes.

In the wake of the Depression, many saw federal governance as a necessary and desirable response to political and economic conditions. An expansion of federal jurisdiction was a mechanism by which to spread and enforce a

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<sup>20</sup> See generally Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003); James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 GEO. WASH. INT'L L. REV. 611 (2003); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

<sup>21</sup> See generally LAWYERS IN SOCIETY: AN OVERVIEW (Richard L. Abel & Philip S.C. Lewis eds., 1995); Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001).

<sup>22</sup> See generally Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345 (2002); Vicki C. Jackson, *Gender and Transnational Legal Discourse*, 14 YALE J.L. & FEMINISM 377 (2002); Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393 (2002); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).



national legal regime. In the 1940s, the civil rights movement turned to the federal courts, and by the Warren era, constitutional interpretation looked favorably upon court-based processes to enable racial equality and to enhance human dignity. Congress not only supported but also expanded this project by authorizing government officials and private parties to bring lawsuits to enforce federal laws regulating an array of issues related to the economy, personal safety, workplace relations, the environment, and interpersonal obligations of fair treatment.

This commitment to rights assertion and rights enforcement spanned the civil and criminal dockets. During the 1960s, the procedural requirement of a right to counsel,<sup>23</sup> which had sat substantively vacant in the U.S. Constitution for almost two hundred years, was given new meaning. The Constitution was read to mandate equipage, to insist on state subsidies for criminal defendants and federal rights to process. *Gideon v. Wainwright*<sup>24</sup> and *Brady v. Maryland*<sup>25</sup> required that indigent criminal defendants be provided with state-paid lawyers who (in theory) were to be accorded respect, some flexibility, and information by prosecutors.

The idea that individuals ought to be empowered and equipped in the contest with the state migrated from the criminal side to civil litigation. The Supreme Court, borrowing Professor Charles Reich's insight that statutory entitlements were forms of "property" to be protected from state deprivation by "due process of law,"<sup>26</sup> required that final decision making about government entitlements employ judicial modes of process to ensure fairness. *Goldberg v. Kelly*<sup>27</sup> is the obvious shorthand here, as, during the 1960s and 1970s, the template for adjudication provided by the Federal Rules was applied in some respects to the administrative context.<sup>28</sup>

Rulemakers revamped other kinds of civil litigation to reflect a concern about the need to equip litigants and to welcome them as rights seekers. The project was not confined to conflicts with the state, for the goal was broader: to facilitate the ability to pursue rights when disputing others. Access fees to courts were modified, mostly by statute.<sup>29</sup> Congress established a Legal

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<sup>23</sup> U.S. CONST. amend. VI.

<sup>24</sup> 372 U.S. 335 (1963).

<sup>25</sup> 373 U.S. 83 (1963).

<sup>26</sup> See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 783-85 (1964).

<sup>27</sup> 397 U.S. 254 (1970) (holding that the state violated procedural due process by terminating public assistance benefits without the opportunity for an evidentiary hearing).

<sup>28</sup> See Judith Resnik, *The Story of Goldberg: Why This Case Is Our Shorthand*, in CIVIL PROCEDURE STORIES 455, 466-69 (Kevin M. Clermont ed., 2004).

<sup>29</sup> The U.S. Supreme Court held that states had to waive access fees for a small subset of litigants. See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (requiring fee waivers for indigent persons seeking divorce), *limited by* *Ortwein v. Schwab*, 410 U.S. 656, 656 (1973), and *United States v. Kras*, 409 U.S. 434, 450 (1973). Statutory provisions can be found at

Services Corporation that employed lawyers, paid by the government, to represent poor litigants in certain kinds of civil disputes.<sup>30</sup> A very small sliver of civil litigants – parents faced with state efforts to terminate their status as legal parents – gained, through federal constitutional law, state-paid lawyers (sometimes).<sup>31</sup>

Aggregate processing served as another vehicle by which to enhance access as, during the 1960s, the Federal Rules were modified to facilitate large-scale litigation. Class actions generate subsidies for litigants by relying on economies of scale to induce lawyers to serve a wider set of claimants.<sup>32</sup> The new class action rule, complemented by statutes authorizing consolidation across federal district courts,<sup>33</sup> reshaped the prospects of what litigation might accomplish.<sup>34</sup> Proceedings involving hundreds and thousands of individuals, some in search of institutional reform and some in search of money, became routine. These large-scale cases soon overshadowed – in the press, in popular imagery, and in law schools – a myriad of small-value cases, such as a social security claimant pitted against a sole adversary, even though that adversary was the state and that person's subsistence was at stake.

Adjudication's flowering can be seen through the congressional creation of new federal rights and the filing of more cases. Between the 1960s and the 1990s, caseloads within the federal system tripled, as hundreds of new statutory causes of action were enacted.<sup>35</sup> Demand soon outstripped the life-tenured judiciary, even as Congress was greatly augmenting its ranks.

As Congress, state legislatures, and judges themselves (interpreting statutes, the Constitution, and the common law) came to recognize more of us as rights holders, leaders of the federal judiciary (supported by groups of lawyers) pressed Congress for more judgeships, staff, facilities, and new rulemaking powers. They succeeded not only in increasing the numbers of federal judges but also in thickening their interactions.

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28 U.S.C. § 1915 (2000), which was narrowed as amended in the Prison Litigation Reform Act, Pub. L. No. 104-134, § 804, 110 Stat. 1321-66, 1321-73 (1996).

<sup>30</sup> See Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified in relevant part as amended at 42 U.S.C. § 2996 (2000)).

<sup>31</sup> See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981); see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996) (invoking *Lassiter* and mandating state-paid transcripts for appeal for indigent parents seeking review of termination judgments).

<sup>32</sup> See generally Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000).

<sup>33</sup> See Multidistrict Litigation Act, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (2000)).

<sup>34</sup> See FED. R. CIV. P. 23 (1966). That rule was later amended. See *infra* note 81 and accompanying text. See generally Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996); Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5, 25-26.

<sup>35</sup> Resnik, *Trial as Error*, *supra* note 15, at 958.

Beginning in the 1930s, the federal judiciary gained the power to make nationwide rules to govern cases filed within it.<sup>36</sup> Moreover, a decade earlier, William Howard Taft had obtained legislative authorization for a Conference of Senior Circuit Judges to meet to talk about the “business” of the federal courts.<sup>37</sup> Today’s Judicial Conference of the United States is the successor institution,<sup>38</sup> which meets twice yearly and which is now assisted by the judiciary’s own Administrative Office (AO), chartered in 1939.<sup>39</sup> Since the 1990s, the AO shares with the FJC the impressive space provided in the Thurgood Marshall Building across from Union Station in Washington, D.C., where the central staff of the federal judiciary compiles data, plans educational programs, and lobbies Congress on behalf of the federal courts.

Through much of that expansion, the traditions of public processes of adjudication (forged during the Renaissance as fledgling city-states attempted to generate their own authority by displaying their power to enforce the law and keep the peace)<sup>40</sup> carried forward. The proposition that judicial power entails an open process became textually enshrined in the Sixth Amendment of the U.S. Constitution, establishing that the accused has a right to a “public

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<sup>36</sup> See Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2000)). Those Rules provided a trans-substantive code to simplify process, to ease access to courts, and to collapse distinctions between law and equity. The Rules’ flexible, equity-based approach diminished formalism. The new rules relaxed pleading requirements but imposed obligations on adversaries to exchange information – both written and oral – about the facts and law in dispute. The concept of lawyers and judges meeting (the “pre-trial”) was borrowed from practices of state courts and the English system, whereas the mandated disclosure of information (“discovery,” accomplished through interrogatories, in-person depositions, production of documents, examination of physical evidence, and admissions) was largely an invention of the 1938 Rules. See Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 713-14 (1988); Resnik, *Trial as Error*, *supra* note 15, at 935-49; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943-75 (1987).

<sup>37</sup> See Act of Sept. 14, 1922, Pub. L. No. 67-298, §§ 1-3, 42 Stat. 837, 837-39 (creating the Conference of Senior Circuit Judges as well as twenty-four new judgeships) (codified as amended at 28 U.S.C. § 331 (2000)).

<sup>38</sup> See 28 U.S.C. § 331 (2000).

<sup>39</sup> See Act of Aug. 7, 1939, Pub. L. No. 76-299, 53 Stat. 1223 (codified as amended at 28 U.S.C. §§ 601-612 (2000)).

<sup>40</sup> See JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 178-79 (1960) (detailing the “‘public’ character” of local courts, meeting in “a castle or manor house,” or possibly “forest or field,” with attendance a duty contingent on land ownership); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 526-37 (2006) (discussing English and European practices of public adjudication centuries ago).

trial.”<sup>41</sup> Access to civil processes, inferentially available when the Seventh Amendment protected jury trial rights, is founded more generally on a mixture of common law traditions and due process inferences.<sup>42</sup> Many state constitutions go further by making explicit rights of access through “open courts” provisions.<sup>43</sup>

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<sup>41</sup> U.S. CONST. amend. VI; *see also* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). Convictions of treason also require confessions to be made in “open [c]ourt.” U.S. CONST. art. III, § 3.

<sup>42</sup> *See, e.g.,* *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986); *see also* *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (holding that “docket sheets enjoy a presumption of openness” and that “the public and the media possess a qualified First Amendment right to inspect them,” and explaining the utility of such an approach). The tradition of access to documents filed in court is not shared by every country. Until recently, English law limited public access to what were termed “statements of case” unless a judge granted permission. *See* NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM* 82-83 (2003) (observing that the public may only obtain access to court documents, other than initial claim forms and judgments, with judicial permission); ADRIAN A.S. ZUCKERMAN, *CIVIL PROCEDURE* 88-89 (2003) (describing the public’s rights of access to court materials as “limited,” and explaining that the public may also obtain access to witness statements during trial unless the court decides otherwise). In October 2005, the Department for Constitutional Affairs (DCA) imposed other restrictions, and that decision prompted objections from many, including media representatives. *See* Joanne Harris, ‘Open Justice’ Wins as DCA Rewrites Claim Access Rules, *LAWYER*, Oct. 2, 2006, at 3, available at <http://www.thelawyer.com/cgi-bin/item.cgi?id=122124&d=122&h=24&f=46>. Thereafter, the rules were amended (effective in October 2006) to make court documents more accessible. *See id.* Restrictions remain, with public access conditioned on court permission, for example, to obtain documents attached to pleadings. Further, “persons identified in statements of case may apply to restrict release of that document.” Dep’t for Constitutional Affairs, *Civil Procedure Rules, Notes To Accompany October 2006 42nd Update*, [http://www.dca.gov.uk/civil/procrules\\_fin/contents/frontmatter/notes42.htm](http://www.dca.gov.uk/civil/procrules_fin/contents/frontmatter/notes42.htm) (last visited Dec. 1, 2006); *see also* Memorandum, Kate Desormeau, *Public Access to Judgments in International Fora* (Aug. 30, 2006) (on file with author).

<sup>43</sup> *See, e.g.,* CONN. CONST. art. I, § 10 (“All courts shall be open . . .”). For a mapping of state constitutional provisions relating to open courts, *see* Memorandum, Lauren Coppola, *State Constitutions – Open Courts and Public Proceedings* (Aug. 4, 2006) (on file with author). As her research details, seventeen state constitutions incorporate the precise phrase “All courts shall be open.” *See, e.g.,* DEL. CONST. art. I, § 9; KY. CONST. § XIV; MISS. CONST. art. III, § 24; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; PA. CONST. art. I, § 11; S.D. CONST. art. VI, § 20; TEX. CONST. art. I, § 13. Other states’ constitutions contain similar provisions worded somewhat differently. *See, e.g.,* MO. CONST. art. I, § 14 (“[T]he courts of justice shall be open to every person . . .”); S.C. CONST. art. I, § 9 (“All courts shall be public . . .”); W. VA. CONST. art. III, § 17 (“The courts of this State shall be open . . .”). In addition, some state constitutions mandate openness for particular events, such as treason trials. Specifically, the constitutions of thirty-five states, plus those of American Samoa and Guam, contain a provision requiring either the testimony of two co-conspirators or “confession in open court” to convict a person of treason. *See, e.g.,* ALA.

In practice, these provisions enabled the public to learn about civil and criminal proceedings via the open doors and windows of courtrooms, through the episodic publication and dissemination of opinions, and by the personal inspection of papers filed with courts. With the rise of the newspaper business, the press provided another route, as did the development of “reporters” of court opinions<sup>44</sup> and commercial publishers of those judgments.<sup>45</sup>

Public access to proceedings *in* courts has become a signature feature of courts,<sup>46</sup> resulting in practices so familiar as to be under-theorized.

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CONST. art. I, § 18; COLO. CONST. art. II, § 9; IND. CONST. art. I, § 29; ME. CONST. art. I, § 12; NEB. CONST. art. I, § 14; WASH. CONST. art. I, § 27. Several other states’ constitutions refer to proceedings “in open court” for other events. *See, e.g.*, OR. CONST. art. I, § 42(1)(a) (declaring the right of crime victims “to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition”); VT. CONST. art. X (providing that a criminal defendant “may in open court or by a writing signed by the accused and filed with the court, waive [his] right to a jury trial and submit the issue of [his] guilt to the determination and judgment of the court without a jury”); VA. CONST. art. 6, § 10 (“[T]he Supreme Court shall conduct a hearing in open court [regarding] disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties . . .”).

<sup>44</sup> *See* MORRIS L. COHEN, ROBERT C. BERRING & KENT C. OLSON, *HOW TO FIND THE LAW* 16-20 (9th ed. 1989) (providing a brief history of the use of court reporters in colonial America); THOMAS A. WOXLAND & PATTI J. OGDEN, *LANDMARKS IN AMERICAN LEGAL PUBLISHING: AN EXHIBIT CATALOG* 1-3 (1990) (describing early reliance on English and American court reporters).

<sup>45</sup> *See generally* Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 *LAW LIBR. J.* 531 (1993) (reviewing U.S. case law concerning copyright interests in published judicial opinions); Lynn Foster & Bruce Kennedy, *The Evolution of Research: Technological Developments in Legal Research*, 2 *J. APP. PRAC. & PROCESS* 275 (2000) (providing a history of electronic case law publishing and research systems); Jason Krause, *Towering Titans*, *A.B.A. J.*, May 2004, at 51 (providing some of the history of the West Publishing Company and its competitors); Patti Ogden, “*Mastering the Lawless Science of Our Law*”: *A Story of Legal Citation Indexes*, 85 *LAW LIBR. J.* 1 (1993) (offering a detailed account of citation systems); Thomas A. Woxland, “*Forever Associated with the Practice of Law*”: *The Early Years of the West Publishing Company*, *LEGAL REFERENCE SERVICES Q.*, Spring 1985, at 115 (explaining that company’s development).

<sup>46</sup> In international courts and in the work of the United Nations on judicial independence and political rights, the openness of court hearings and judgments is protected. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14, U.N. Doc. 1/6316 (Dec. 16, 1966) (“[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded [for limited reasons].”). Similarly, the European Convention on Human Rights creates a presumption of openness, coupled with a balancing test when publicity would be harmful. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221, 228 (“Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests

Explanations emerged in doctrine and commentary only when challenges – many brought by the media – were made to closures. Presumptions of openness typically rest on historical tradition, coupled with insistent opposition to certain forms of secretive state processes. Further, some argue that, through access, the public is educated, the judges and litigants and lawyers are supervised, and knowledge of legal requirements is disseminated.<sup>47</sup> All of this openness now nests in the language of rights.

Yet the significant expansion of life-tenured judges and of adjudicatory opportunities, coupled with the many new buildings, proved insufficient for the task. Turn then to the next chart, Authorized Magistrate Judgeships, which marks the introduction in the late 1960s of a new kind of federal judge.<sup>48</sup>

### Authorized Magistrate Judgeships: 1971 and 2001

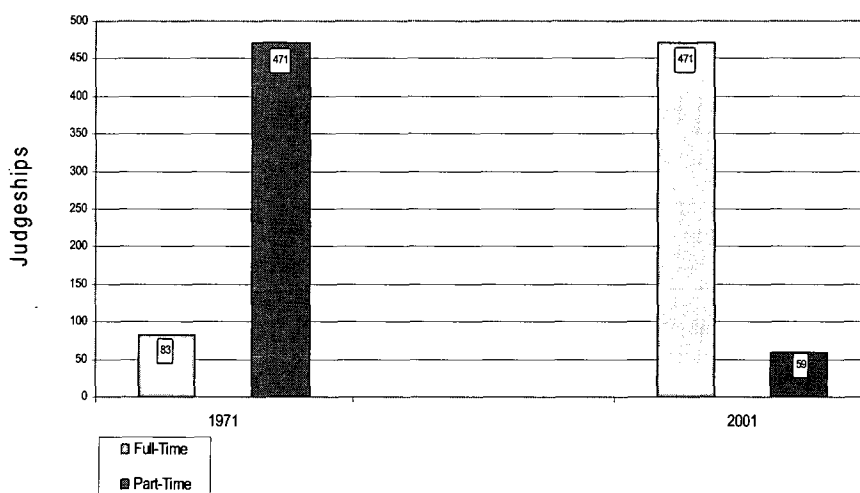


Figure 3

of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”).

<sup>47</sup> See generally Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 405-26 (1987).

<sup>48</sup> See Federal Magistrates Act of 1968, Pub. L. No. 90-578, § 101, 82 Stat. 1108, 1108-14 (codified as amended at 28 U.S.C. §§ 631-639 (2000)).

When the position was first created, those who held it were called simply “magistrates”; the job was modeled in part after a pilot program of “pre-trial examiners” in the congested district courts of New York and Washington.<sup>49</sup> They were understood to be surely more than law clerks but definitely not judges. Moreover, as one can see from the graph detailing the growth in the number of positions, the cadre in 1971 of about 470 were mostly part-time employees of the federal government. Only a small sliver, about 80, had full-time commissions. The same graph permits a look thirty years later, by which time the position’s name had changed to “magistrate judge,”<sup>50</sup> and more than 450 occupied that job full-time, dwarfing the few remaining part-time positions. Magistrate judges’ charter now includes the authority to preside, with parties’ consent, at civil trials, and their powers include the authorization to hold individuals in contempt of court.<sup>51</sup>

More than budgetary appropriations were needed to fund the positions and build the courtrooms for this new set of judges. Also required was a major doctrinal reinterpretation of Article III of the U.S. Constitution. One might have thought that its provisions, describing federal judges as individuals nominated by the President, confirmed by the Senate, and holding the “judicial Power of the United States,”<sup>52</sup> would have precluded the devolution of so much power to individuals who are not life-tenured, not selected by the President, and not approved by the Senate, but are purely creatures of statute. Further, early twentieth-century Supreme Court holdings guarded at least some fact-finding preserve for life-tenured judges and were protective of what the Court termed the “essential attributes of the judicial power.”<sup>53</sup>

Yet, beginning in the late 1960s, Congress delegated a good deal of federal adjudicatory power to magistrates, appointed for eight-year renewable terms by district judges in the venue for which they are selected.<sup>54</sup> Congress has expanded magistrate judges’ mandates, and the statutory grants have survived various legal challenges, as have many other delegations to non-Article III federal judges. In general, late twentieth-century Supreme Court precedents tolerated – and sometimes celebrated – the devolution of powers and tasks formerly associated with Article III judging.<sup>55</sup>

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<sup>49</sup> See Resnik, *Trial as Error*, *supra* note 15, at 988-89.

<sup>50</sup> See 28 U.S.C. § 636 (2000).

<sup>51</sup> *Id.* § 636(c), (e).

<sup>52</sup> U.S. CONST. art. III, § 1.

<sup>53</sup> *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

<sup>54</sup> See 28 U.S.C. § 631(e).

<sup>55</sup> The Supreme Court did find one such delegation beyond the boundaries of Article III. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982). However, subsequent decisions have adopted the approach espoused by the dissent in that case: that courts are to assess the devolution of Article III authority by evaluating the congressional policy goals and determining whether a particular provision encroaches on Article III “values.” See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847-59 (1986);

Magistrate judges are not the only ones to benefit from this new doctrine facilitating efforts to staff judicial positions with actors other than those selected via the constitutional mechanism stipulated in Article III. The next chart, Authorized Bankruptcy Judgeships, brings into focus another set of non-life-tenured judges, bankruptcy judges who, through selection by federal appellate judges, sit for fourteen-year renewable terms.<sup>56</sup>

### Authorized Bankruptcy Judgeships: 1984, 1991, 2001

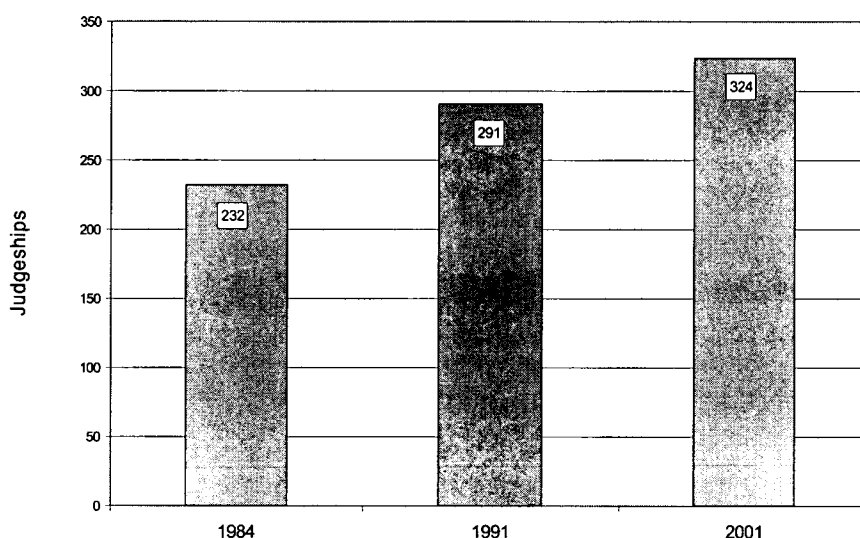


Figure 4

The bankruptcy courts receive some 1.3 million filings annually.<sup>57</sup> Like magistrate judges, bankruptcy judges may issue contempt citations and can preside over a wide array of matters.<sup>58</sup> Moreover, bankruptcy judges have the

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Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 929-33 (1988); Resnik, *Inventing the District Courts*, *supra* note 4, at 637-42.

<sup>56</sup> See 28 U.S.C. § 152 (2000).

<sup>57</sup> See FEDERAL JUDICIAL STATISTICS 2001, *supra* note 7, at 107 tbl.F.

<sup>58</sup> See The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 105(a), 92 Stat. 2549, 2555 (codified as amended at 11 U.S.C. § 105(a) (2000)) ("The bankruptcy court may issue



power to do some appellate work, comprising “bankruptcy appellate panels” that in many circuits provide a first tier of review.<sup>59</sup>

The chart below, Authorized Trial-Level Federal Judgeships in Article III Courts, provides a comparison between the federal constitutional and statutory judiciaries. At the trial level, the number of non-life-tenured judges is greater

### Authorized Trial-Level Federal Judgeships in Article III Courts: 2001 (Nationwide)

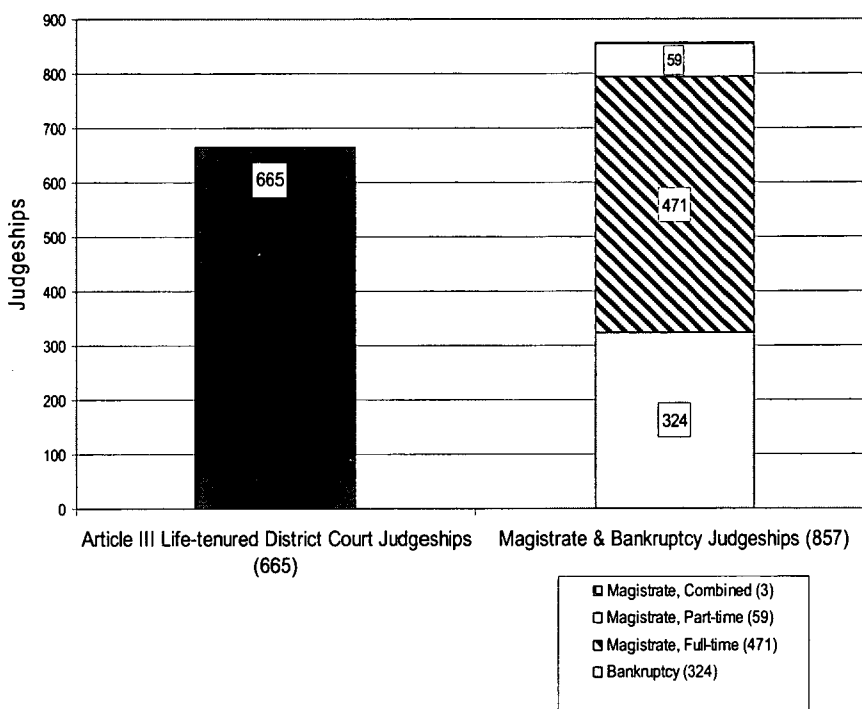


Figure 5

any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”); FED. R. BANKR. P. 9020 (setting out the rules for holding an individual in contempt); *see also* *Burd v. Walters (In re Walters)*, 868 F.2d 665, 669 (4th Cir. 1989) (upholding a bankruptcy court’s order for contempt as authorized by 11 U.S.C. § 105(a)).

<sup>59</sup> *See* 28 U.S.C. § 158(b)(1) (2000) (“The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council . . . to hear and determine, with the consent of all the parties, appeals . . .”).

than that of the life-tenured. These new statutory judgeships, serving within Article III but lacking Article III attributes, might be understood as an “end-run” by Congress and the life-tenured judiciary around the strictures of the Constitution. Each new constitutional judge needs Congress to authorize judgeships, which are line-by-line items in bills and which thereby give patronage opportunities to a sitting President. Vacancies can be filled only after the President selects nominees who, in turn, succeed (as most do<sup>60</sup>) in garnering approval from the Senate.

Concluding that the constitutional “price” was too high, Congress worked with the official policymaking arm of the federal judiciary to craft alternative forms of judgeships, created by statutes that purposively avoid the appointment processes of Article III. Unlike the constitutional judgeships, these statutory judges, who serve for fixed and renewable terms, are chosen by the life-tenured judiciary through a low-visibility process that is outside the purview of the political framework required by the Constitution for Article III judges. Those statutory innovations, challenged as unconstitutional devolutions of authority, have in turn mostly been upheld by the Supreme Court.<sup>61</sup> This manufacture of judges from within may raise questions of democratic accountability,<sup>62</sup> but it is an administrative innovation that responds to the demands for adjudication that “we” (an expanding set of individuals and groups endowed by Congress and eligible through political theories of equality and democratic governance to bring claims) have imposed.

The many changes can be seen by looking at some of the late twentieth-century federal building projects. The next image is of the twenty-nine story federal courthouse in St. Louis, Missouri, which opened in 2000 and contrasts sharply with the 1906 low-rise building in Grand Forks, North Dakota.<sup>63</sup>

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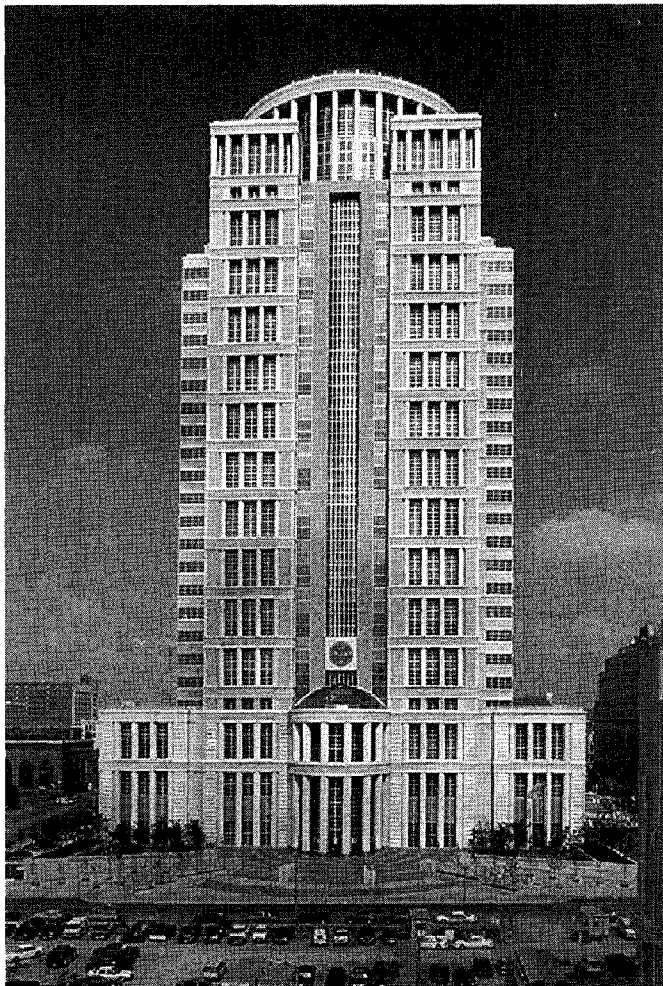
<sup>60</sup> See Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 635-37 & chart 5 (2005) [hereinafter Resnik, *Judicial Selection and Democratic Theory*].

<sup>61</sup> As noted above, the Supreme Court did hold unconstitutional the broad jurisdictional grants to bankruptcy judges in the 1978 bankruptcy legislation. See *supra* note 55. The doctrine on Article III makes some innovations impermissible but leaves unclear the boundaries. As I have elsewhere detailed, while the case law is confusing, the trend line is not. Over the last forty years, the Supreme Court has approved a growing set of delegated powers to non-life-tenured judges. See Resnik, *Inventing the District Courts*, *supra* note 4, at 622-44.

<sup>62</sup> See Resnik, *Inventing the District Courts*, *supra* note 4, at 679. See generally Resnik, *Judicial Selection and Democratic Theory*, *supra* note 60.

<sup>63</sup> The photograph in Figure 6, taken by the Honorable David D. Noce, Magistrate Judge of the Eastern District of Missouri, is provided by him and reproduced with his permission.

Thomas Eagleton Federal Courthouse, St. Louis, Missouri



Architect: Hellmuth, Obata + Kassabaum, Inc. (2000)

© Honorable David D. Noce

Figure 6

While the Thomas Eagleton Federal Courthouse in Missouri is one of the largest federal courthouse buildings,<sup>64</sup> it is not the only new one. Rather, it joins dozens more, all aimed at accommodating the significant increase in the number of judges and litigants. Currently, about 800 such facilities serve to house more than 30,000 in staff and some 2000 statutory and constitutional judges, who annually respond to more than 300,000 filings (both civil and criminal) and more than 60,000 appeals.<sup>65</sup>

To put these numbers into context, a reminder is in order about the role of state courts. The numbers of judges and of cases filed in those systems far outstrip those of the federal system. California alone has nearly 1600 authorized judgeships,<sup>66</sup> and states more generally deal with millions of matters, with counts varying depending on what kinds of “cases” are included in a tally.<sup>67</sup>

As the symposium that prompted this essay was held at the Boston University School of Law, a focus on the local federal facilities is appropriate. The John Joseph Moakley Federal Courthouse opened in Boston in 1998; its architect was Harry Cobb and the panels that grace its walls are by the artist Ellsworth Kelly.<sup>68</sup>

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<sup>64</sup> That description is provided by the General Services Administration (GSA). *See* U.S. Gen. Servs. Admin., Thomas F. Eagleton U.S. Courthouse, [http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA\\_BASIC&contentId=15847&noc=T](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=15847&noc=T) (last visited Dec. 1, 2006). The architecture firm was Hellmuth, Obata + Kassabaum, Inc. *See* City of St. Louis Development Activity: Eagleton Federal Courthouse, <http://stlcin.missouri.org/devprojects/projinfo.cfm?DevProjectID=47&isComGov=1> (last visited Dec. 1, 2006).

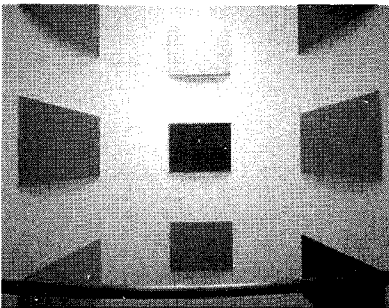
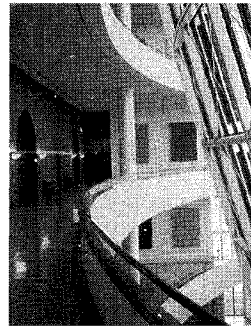
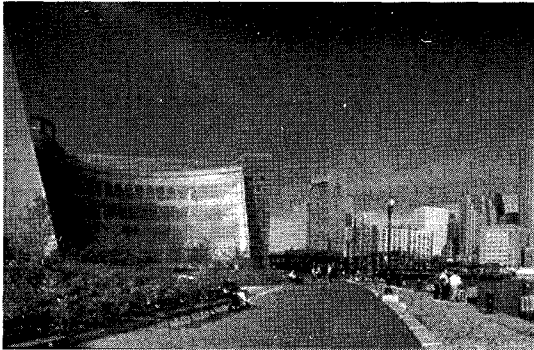
<sup>65</sup> *See* ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 14 (2006), *available at* <http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf>. Included in staff numbers are Probation Department personnel.

<sup>66</sup> California Courts: Questions & Answers, <http://www.courtinfo.ca.gov/qna/qa7.htm> (last visited Dec. 1, 2006) (describing California as having “1580 authorized judgeships”).

<sup>67</sup> *See, e.g.*, JUDICIAL COUNCIL OF CAL., 2006 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 1995-1996 THROUGH 2004-2005, at ix (2006), *available at* <http://www.courtinfo.ca.gov/reference/documents/csr2006.pdf> (reporting that, in Fiscal Year 2004-2005, there were 8990 filings at the Supreme Court of California, 23,754 filings at the courts of appeal, and 8,972,056 filings at the superior courts). *See generally* NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT (2006), *available at* [http://www.ncsconline.org/D\\_Research/csp/2005\\_files/0-EWWwhole%20Document\\_final\\_1.pdf](http://www.ncsconline.org/D_Research/csp/2005_files/0-EWWwhole%20Document_final_1.pdf).

<sup>68</sup> The photographs in Figures 7 and 8, by Steve Rosenthal, are reproduced with his permission and that of the artist Ellsworth Kelly, and obtained with the assistance of the Honorable Douglas P. Woodlock. The courthouse was designed by the architecture firm Pei Cobb Freed & Partners. *See* Pei Cobb Freed & Partners, John Joseph Moakley United States Courthouse and Harborpark, <http://www.pcfandp.com/a/p/9111/s.html> (last visited Dec. 1, 2006). For a description of the opening of the courthouse, see Symposium on Art

John Joseph Moakley Federal Courthouse  
Boston, Massachusetts



Architect: Harry Cobb (1998)  
Artist: Ellsworth Kelly

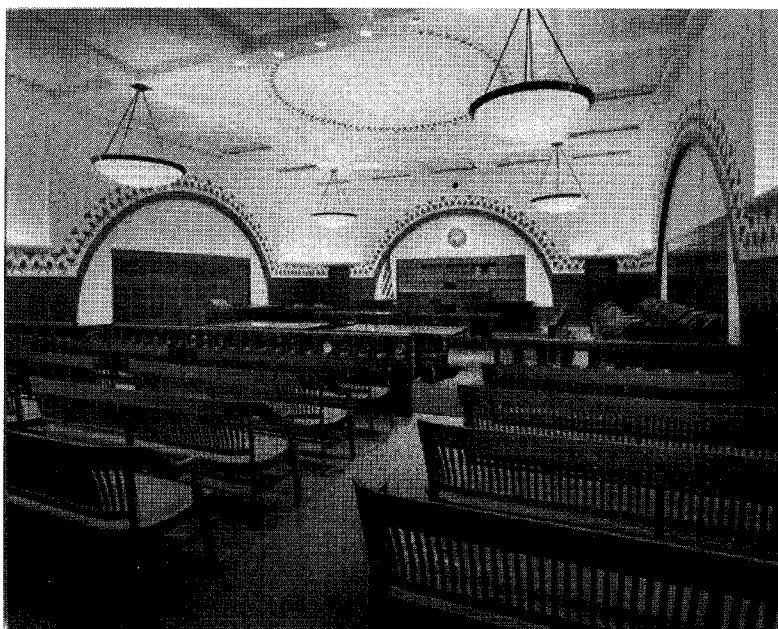
© Steve Rosenthal

Figure 7

and Architecture of Civic Buildings: A Symposium To Celebrate the Opening of the U.S. Courthouse, in Boston, Mass. (Sept. 24, 1998) (unpublished program and transcript on file with author). For additional information on the courthouse, see *Discovering Justice*, The John Joseph Moakley United States Courthouse, <http://www.discoveringjustice.org/courthouse/index.shtml> (last visited Dec. 1, 2006), and Boston Courthouse Management Associates (BCMA), <http://www.bostoncourthousemanagement.com> (last visited Dec. 1, 2006). BCMA is a third-party contractor retained by the GSA to oversee the administration of the courthouse's facilities. *See id.*

In this courthouse, some twenty-five trial courts look more or less like the courtroom interior pictured below.<sup>69</sup> A judge's bench is placed at the back, a

Interior of a Courtroom  
Federal Courthouse, Boston



© Steve Rosenthal

Figure 8

bit lower than is common, in a self-conscious (if subtle) effort to portray law as accessible and not unduly hierarchical. Each wall has an arch of equal height,

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<sup>69</sup> A total of twenty-seven courtrooms are in this courthouse, two of which are currently used for appellate proceedings. Of the twenty-five trial courtrooms, the six for magistrate judges are somewhat smaller (at about 18,000 square feet) than are the Article III trial judges' courtrooms (at about 24,000 square feet). The federal judiciary has developed guidelines for its buildings. See SEC. & FACILITIES COMM. OF THE JUDICIAL CONFERENCE OF THE U.S., U.S. COURTS DESIGN GUIDE 4-40 to 4-41 (1997), available at <http://www.wbdg.org/ccb/GSAMAN/courts.pdf>. Some revisions of that guide have been made and others are under consideration. See ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR 28 (2006), available at <http://www.uscourts.gov/library/dir rpt05/2005Annualreportslim.pdf> (discussing proposed revisions for security and economy).

to suggest the equality of all before the law.<sup>70</sup> The designers of this courthouse chose the arches and the courtrooms as central icons of their building.

Yet a disjuncture exists between this new building, its courtrooms, and the rules and practices that now surround federal processes, which have also been reshaped many times during the twentieth century. Judges are now multi-taskers, sometimes managers of lawyers and of cases, sometimes mediators, and sometimes referral sources, sending people outside of courts to alternative fora. In the United States and elsewhere, we have seen a failing faith in adjudicatory procedure, a growth in anti-adjudicatory rhetoric, and the promotion of alternative dispute resolution by judges and lawyers. Local rules of the Massachusetts federal courts, for example, instruct judges to bring up the topic of settlement every time they meet with lawyers and litigants.<sup>71</sup> Those provisions, in turn, are illustrative of a nationwide shift away from adjudication, as is detailed below.

## II. THE WILTING OF ADJUDICATION

Concurrent with the narrative I have just sketched of the triumphant expansion of adjudication as a touchstone of thriving democracy is another story, describing adjudication as in decline. With more dramatic flair, such a narrative could claim the “death of adjudication.”<sup>72</sup> In both public and private sectors, leaders in many countries proffer conciliation as the exemplary model of judgment. Through mediation or negotiation, private outcomes predicated on the parties’ consent are promoted over those imposed by judges through public judgment implementing state-generated regulatory norms. This movement toward alternative dispute resolution (ADR) is propelled by

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<sup>70</sup> The Honorable Douglas P. Woodlock, a district judge in the District of Massachusetts, and the Honorable Stephen Breyer, Associate Justice of the U.S. Supreme Court and formerly a judge on the Court of Appeals for the First Circuit, were actively involved in planning and overseeing the building of the Moakley Federal Courthouse. See Stephen G. Breyer, *Foreword* to CELEBRATING THE COURTHOUSE: A GUIDE FOR ARCHITECTS, THEIR CLIENTS, AND THE PUBLIC 9, 9-12 (Steven Flanders ed., 2006) (describing the participatory effort entailed in the design of the building); Douglas P. Woodlock, *Drawing Meaning from the Heart of the Courthouse*, in CELEBRATING THE COURTHOUSE: A GUIDE FOR ARCHITECTS, THEIR CLIENTS, AND THE PUBLIC, *supra*, at 155, 164 (explaining that “[h]ow we create and preserve [courtrooms] tells us a good deal about the value we attach to justice”); see also Douglas P. Woodlock, *Architecture and Design of the New Federal Courthouse in Boston*, Lecture for the Boston Society of Architects (Jan. 25, 1995) (transcript on file with author). On the role of courts in providing services akin to what members of Congress do for their districts, see Douglas P. Woodlock, *Dedication Ceremony of the John Joseph Moakley United States Courthouse*, NEW ENG. J. PUB. POL’Y, Fall/Winter 2001-2002, at 9.

<sup>71</sup> D. MASS. R. 16.4(a)-(b), available at <http://www.mad.uscourts.gov/LocPubs/combined01.pdf>.

<sup>72</sup> I use that phrase in the title of another essay. Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173 (2004) [hereinafter Resnik, *Triumph and Death of Adjudication*].

political and social forces trumpeting deregulation and privatization, and is staffed by lawyers and other professionals seeking and shaping new markets.

Different modes of ADR limit adjudication's reach. One form is court-based ADR,<sup>73</sup> which creates a "new" civil procedure. Techniques such as mediation, arbitration, and settlement conferences, once termed "extrajudicial,"<sup>74</sup> have become regular features of civil processes. Through rule changes, training, and educational programs, the definition of the "good judge" became one who focused on and achieved dispositions while conserving the investment of time. What is judicial (and judicious) is changing. Less in use are the tasks associated with formal adjudication: public processes, reasoned deliberation, and the dissemination of information about processes and outcome.

This reconfiguration is not limited to the trial level. More than half the circuits have "civil appeals management plans" requiring disputants to meet and attempt to settle cases while they are pending on appeal.<sup>75</sup> Further, many appellate courts rely on staff to screen cases and send appeals to various tracks. Although as a formal matter, aggrieved parties unhappy with final judgments have a statutory appeal "as of right," in practice what constitutes such an appeal varies a good deal. Discretionary and low-visibility judgments by judges and staff determine which appeals receive more consideration than others.<sup>76</sup> In many circuits, oral arguments are no longer presumptive but depend upon courts' permission, and when litigants are permitted to argue cases, presentations may be limited to ten minutes for each side. Moreover, most appellate decisions do not result in published opinions; rather, one in five judgments produce an officially published ruling.<sup>77</sup>

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<sup>73</sup> See generally Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11; Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002).

<sup>74</sup> The word "extrajudicial" was used in 1983, in the Federal Rules of Civil Procedure, to refer to such processes, explaining that at pretrial conferences consideration could be given to "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." See FED. R. CIV. P. 16(c)(7) & advisory committee's note (1983) (amended 1993).

<sup>75</sup> See FED. R. APP. P. 33. For an early description of such programs, see generally Irving R. Kaufman, *Must Every Appeal Run the Gamut? – The Civil Appeals Management Plan*, 95 YALE L.J. 755 (1986).

<sup>76</sup> See generally Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 674-80 (2006); William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290 (1996).

<sup>77</sup> See Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1465 (2004); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 402 (2002).



The sources of these changes at both trial and appellate levels are multiple, ranging from adjudication's successes (attracting large numbers of claimants placing demands that exceed capacity) to concerns about adjudication's failures (as too expensive, too cumbersome, too aggressive). Complaints include distress at the adversary model; with its dependency on lawyers, it is described as unduly expensive and strategically exploitative. While some critics argue for reform based on claimed problems with the current processes, others have a more fundamental objection. They disagree with the premise that ready access to pursuing disputes through courts is useful and argue that too much reliance on adjudication is dysfunctional economically and politically.

Elsewhere, I have detailed such objections,<sup>78</sup> and here, I focus on their impact. The 1938 Federal Rules of Civil Procedure have been substantially amended to direct judges to promote ADR.<sup>79</sup> Opportunities for class actions have been reduced, in part through case law interpreting the rules providing for such treatment,<sup>80</sup> in part from rewriting those rules,<sup>81</sup> and in part by congressional intervention in passing the Class Action Fairness Act of 2005 (CAFA).<sup>82</sup> Congress has also written new statutes to authorize court-annexed arbitration programs<sup>83</sup> and has mandated the use of ADR in agencies as well as in courts.<sup>84</sup> Institutions supporting ADR have proliferated, convening conferences (on topics such as "Court ADR"), proffering services (from firms such as "Endispute" and "JAMS" – "Judicial Arbitration Mediation Services"), teaching law school classes, and shaping model rules.<sup>85</sup>

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<sup>78</sup> See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 246-53 (1995) [hereinafter Resnik, *Many Doors, Closing Doors*]; Resnik, *Triumph and Death of Adjudication*, *supra* note 72, at 183-86.

<sup>79</sup> See, e.g., FED. R. CIV. P. 16 (amended 1993).

<sup>80</sup> *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995).

<sup>81</sup> FED. R. CIV. P. 23(c), (e), (g), (h) (amended 2003).

<sup>82</sup> Pub. L. No. 109-2, 119 Stat. 4 (to be codified at scattered sections of 28 U.S.C.); see also Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1606 (2006) ("The effect of CAFA will probably be to reduce the number of multistate class actions, and certainly the number of national class actions.").

<sup>83</sup> See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified as amended at 28 U.S.C. §§ 651-658 (2000)).

<sup>84</sup> See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified as amended at 5 U.S.C. §§ 571-584 (2000)).

<sup>85</sup> See, e.g., UNIF. MEDIATION ACT (amended 2003). The Uniform Mediation Act was initially approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws in August 2001. See Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Mediation Act (2001), [http://www.nccusl.org/nccusl/uniformact\\_summaries/uniformacts-s-uma2001.asp](http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-uma2001.asp) (last visited Dec. 1, 2006). When judges leave the bench and work as "private judges," some can command rates of

Both the story of adjudication's contraction and that of its expansion are embedded in a host of changes and political attitudes that extend far beyond the revamping of courts' processes. Bodies of substantive law – such as tort, contract, consumer, environmental, and civil rights – are also means by which to alter the demand on courts, either by facilitating or constraining opportunities to bring claims.<sup>86</sup> When litigation rights expand, they do so through an amalgam of process and substance, just as their contraction depends upon revising rules on liability and remedy.<sup>87</sup>

As one views courtrooms such as those in the Boston federal courthouse, one should be aware of the uses of those spaces. When that courthouse opened in 1998 in the District of Massachusetts, 142 civil and 48 criminal trials were completed.<sup>88</sup> With approximately twenty-five trial courtrooms for district and magistrate judges available (and ignoring that some of the District's trials took place at other divisions, such as the courthouse in Springfield, Massachusetts), about seven or eight trials were held per courtroom per year in the new courthouse. Of course, trials are not the only proceeding for which courtrooms are used. But congressional investigations (prompted by requests for funding of courthouse construction) report that federal courtrooms have their "lights on" – meaning lit for at least two hours a day – about half of the time.<sup>89</sup>

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thousands of dollars a day. See Eric Berkowitz, *Is Justice Served?*, L.A. TIMES, Oct. 22, 2006, West Magazine, at 20.

<sup>86</sup> See, e.g., Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101(b), 109 Stat. 737, 743-49 (codified in relevant part as amended at 15 U.S.C. § 78u-4 (2000)); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 803-804, 110 Stat. 1321-66, 1321-70 to -75 (1996) (codified in relevant part as amended at 28 U.S.C. § 1915; 42 U.S.C. § 1997 (2000)).

<sup>87</sup> See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002) (holding that alleged violations of a federal statute protecting student privacy did not give rise to a private action for damages); *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that regulations promulgated pursuant to Title VI were not enforceable by private litigants). See generally Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 231-71 (2003) [hereinafter Resnik, *Constricting Remedies*].

<sup>88</sup> See ADMIN. OFFICE OF THE U.S. COURTS, 1998 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 178 tbl.C-7 (1999), available at <http://www.uscourts.gov/dirrpt98/c07sep98.pdf>. According to the Boston Bar Association's recent analysis of trial data, the rate of dispositions by trial in civil cases has been dropping from the late 1980s, when the percentage of dispositions by trial was about five percent, to the early years of the twenty-first century, when dispositions by trial averaged between two and three percent. See TASK FORCE ON THE VANISHING JURY TRIAL, BOSTON BAR ASS'N, JURY TRIAL TRENDS IN MASSACHUSETTS: THE NEED TO ENSURE JURY TRIAL COMPETENCY AMONG PRACTICING ATTORNEYS AS A RESULT OF THE VANISHING JURY TRIAL PHENOMENON app. at 30 tbl.1 (2006) (on file with author) [hereinafter BOSTON BAR ASS'N TASK FORCE].

<sup>89</sup> A 1997 General Accounting Office study defined courtroom usage as "any activity" (including but not limited to trials) for any portion of the day – a measure later seen as generous in that it counted usage of a couple of hours per day. See U.S. GEN. ACCOUNTING OFFICE, No. GAO/GGD-97-39, COURTHOUSE CONSTRUCTION: BETTER COURTROOM USE

I have used a local example but not to make a local point. The data on trial rates in Boston are not anomalous. As of 2002, a trial started in fewer than two of one hundred civil cases filed in federal courts.<sup>90</sup> In contrast, in the late 1930s, about twenty percent of civil cases were tried.<sup>91</sup> Moreover, as can be seen from the next graph,<sup>92</sup> Civil and Criminal Trial Rates Between 1976 and 2000, trial rates have been dropping for decades, on both the civil and criminal side.<sup>93</sup> Even as one can find minor variations depending on the kind of case, the trend line for all kinds of proceedings is the same: a downward slope. Further, as of 2002, “the average federal district judge presided over only about nine trials”; in 1962, the average was thirty-nine.<sup>94</sup> The phenomenon of the low rate of trials has come to be known within the legal profession as the problem of “the vanishing trial.”<sup>95</sup>

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DATA COULD ENHANCE FACILITY PLANNING AND DECISIONMAKING 8 (1997), available at <http://www.gao.gov/archive/1997/gg97039.pdf>. That metric resulted in a fifty-four percent usage rate of available days in sixty-five courtrooms at the seven locations that were studied. *Id.* at 10; see also U.S. GEN. ACCOUNTING OFFICE, NO. GAO/GGD-97-59R, COURTHOUSE CONSTRUCTION: INFORMATION ON THE USE OF DISTRICT COURTROOMS AT SELECTED LOCATIONS app. 1 at 9 tbl.I.3 (1997), available at <http://archive.gao.gov/paprpdf/158673.pdf> (reporting similar results in a study of four other locations); U.S. GEN. ACCOUNTING OFFICE, NO. GAO-01-70, COURTHOUSE CONSTRUCTION: SUFFICIENT DATA AND ANALYSIS WOULD HELP RESOLVE THE COURTROOM-SHARING ISSUE 8, 18 (2000) (analyzing the results and recommending further data collection). As of the fall of 2006, plans for new evaluations of federal courthouse usage are underway.

<sup>90</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459-60 (2004); see also Mark R. Kravitz, *The Vanishing Trial: A Problem in Need of a Solution?*, 79 CONN. B.J. 1, 4-5 (2005); Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1.

<sup>91</sup> Galanter, *supra* note 90, at 464.

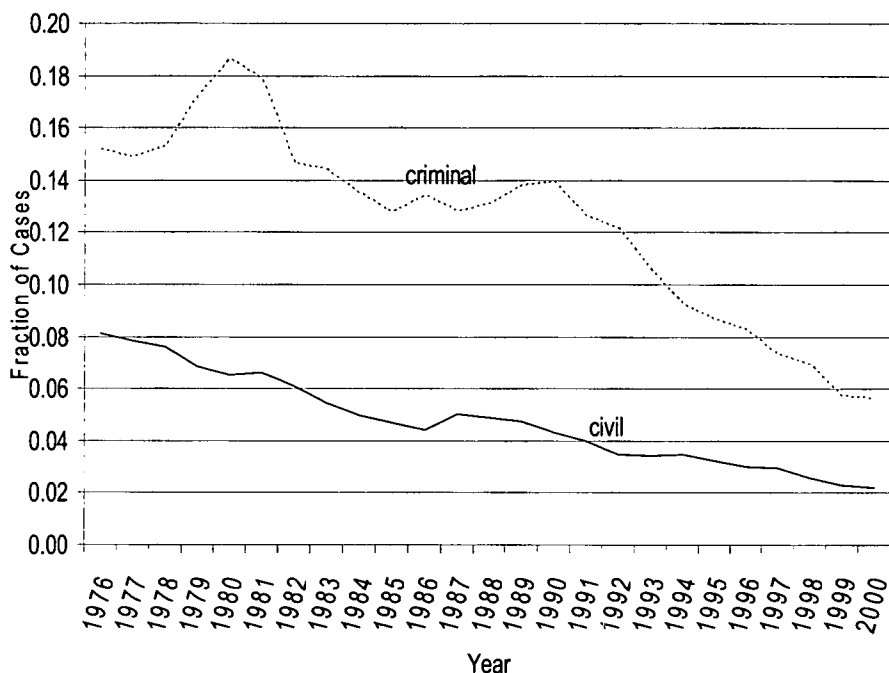
<sup>92</sup> Figure 9 is reproduced with the permission of the Honorable Patrick E. Higginbotham. Judge Higginbotham has served as the Chair of the Judicial Conference Committee that reviews the Federal Rules of Civil Procedure and has written many articles about the federal system. He has also voiced his concern about the trend away from trials. See, e.g., Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002).

<sup>93</sup> Marc Galanter makes the comparable point that in 1962, about 11.5 percent of civil cases were tried; thus, both the proportion and the absolute number of trials has declined. Galanter, *supra* note 90, at 459-60.

<sup>94</sup> Kravitz, *supra* note 90, at 5 (discussing the fact that, while the number of trials per judge has decreased, the length of trials has increased).

<sup>95</sup> The American Bar Association Section of Litigation sought out a group of researchers (myself included) to understand and evaluate the change in the rate of trial. The results were published in the *Journal of Empirical Legal Studies*. See Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). Further, since that publication, many

### Civil and Criminal Trial Rates in U.S. Federal Courts: 1976-2000



© Honorable Patrick Higginbotham

Figure 9

But it would be an error to assume that because relatively few trials are occurring in the federal courthouses across the United States, evidentiary hearings have vanished. Rather, many such exchanges have migrated from courts into agencies, which are another form of alternative dispute resolution. Figure 10, Authorized Judgeships in Article III Federal Courts and in Federal Agencies, provides a comparative picture.

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localities have also reviewed their filing and trial rates. *See, e.g.*, BOSTON BAR ASS'N TASK FORCE, *supra* note 88.

### Authorized Judgeships in Article III Federal Courts and in Federal Agencies (2002)

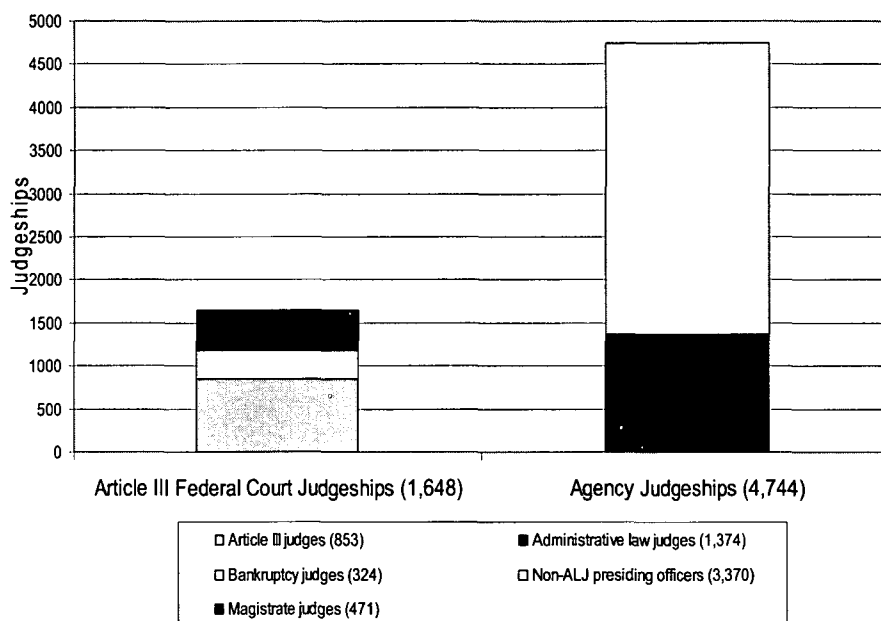


Figure 10

One can see the total number of judgeships – life-tenured or otherwise – at the trial level in federal courthouses around the United States, as well as the judgeships in federal agencies around the country. This count includes both the Article III district court judgeships and the statutory magistrate and bankruptcy judgeships. More than 1650 authorized positions exist, as contrasted with some 4700 administrative law judges or presiding officers who work in federal agencies.<sup>96</sup>

The next chart, Estimate of Evidentiary Proceedings in Article III Courts and in Four Federal Agencies, is aimed at depicting all forms of “evidentiary

<sup>96</sup> See RAYMOND LIMON, OFFICE OF ADMIN. LAW JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY: THEN AND NOW: A DECADE OF CHANGE 1992-2002 app. C at 7 (2002); see also Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1608 (2004).

proceedings” (not only “trials”) that took place in federal courthouses like those in St. Louis and Boston, as well as in four federal agencies with large caseloads. Before discussing the comparison, some explanation of the

### Estimate of Evidentiary Proceedings in Article III Courts and in Four Federal Agencies (2001)

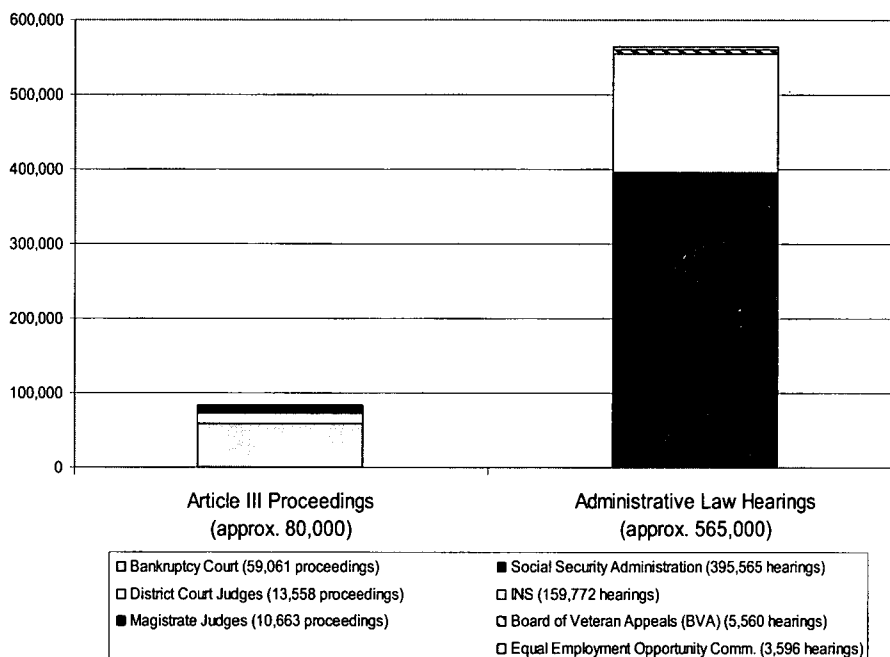


Figure 11

category “evidentiary hearings” is in order. The Administrative Office of the United States Courts, which provides statistics on the federal system, defines as “trials” all proceedings, civil or criminal, before Article III judges that are “contested hearings at which evidence is presented.”<sup>97</sup> Separate tables are kept to tally such proceedings before magistrate and bankruptcy judges. Included in the definition would be testimony taken on motions, trials begun but ended

<sup>97</sup> See ADMIN. OFFICE OF THE U.S. COURTS, 2001 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 24-25 (2002), available at <http://www.uscourts.gov/judbus2001/front/2001artext.pdf>.

through settlement, and those trials that result in the disposition of a case. Further, in this accounting, I have also included proceedings at which either constitutional (district court) or statutory (magistrate and bankruptcy) judges preside in courthouse-based hearings. This generous estimate found about 100,000 evidentiary proceedings a year.

On the other side of this chart is a bar representing the more than half a million evidentiary proceedings that occurred in 2001 in four federal agencies – the Social Security Administration, the Equal Employment Opportunity Commission (EEOC), the Immigration and Naturalization Service, and the Department of Veterans' Affairs.<sup>98</sup> The point here is that, while the taking of evidence in federal courts may be waning (if not vanishing), evidentiary proceedings have also migrated into agencies functionally serving as courts. Courts have “outsourced” a significant portion of their production to agencies, as well as to private sector providers about whom too little data are available to know the volume, the location, the processes, or the outcomes of such proceedings.

Administrative adjudication takes place in federal office buildings that, unlike the lovely federal courthouse buildings shown here, are not often gracious statements of public prosperity and good governance. Not only are the physical spaces less ample, they are also less accessible to the general public. When compared with the federal courthouse buildings, agency administration is impoverished on many measures – from the architecture and art to the status and salaries of the judges, the unavailability of lawyers for many of the litigants, and the higher volume and shorter duration of the proceedings.

In terms of public access, no ready way exists to watch these exchanges in which government officials – hearing officers, administrative law judges, and other agency employees – decide the rights and obligations of tens of thousands of persons. For example, under the governing rules, EEOC hearings (related to claims about discrimination in federal employment) may be attended by outsiders only if specific permission is given.<sup>99</sup> Hearings on veterans' claims are generally closed.<sup>100</sup> Immigration hearings other than exclusion proceedings are presumptively open; however, immigration judges may respond to space constraints by limiting attendees – with priority in seats

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<sup>98</sup> I discuss this phenomenon and the sources for this calculation in Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004); see also Memorandum, Natalie Ram & Bertrall Ross, Analyzing Federal Administrative Adjudication (June 6, 2006) (on file with author).

<sup>99</sup> 29 C.F.R. § 1614.109(e) (2005) (“Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public.”).

<sup>100</sup> See, e.g., 38 C.F.R. § 20.701 (2005) (“Only the appellant and/or his or her authorized representative may appear and present argument in support of an appeal.”).

going to the press.<sup>101</sup> Further, immigration judges may also close hearings in order to protect witnesses, or when family abuse is at issue, when certain kinds of protective orders are sought, and under some case law, due to national security concerns.<sup>102</sup> Social Security hearings are open, unless otherwise ordered closed.<sup>103</sup>

As a practical matter, however, even if one has the “right” to attend these various proceedings, it is difficult to find them. Unlike the courthouses with designated courtrooms for public observances, the office spaces used by agencies do not invite “street traffic.” Further, one cannot easily read – in lieu of seeing – the decisions of federal administrative adjudication. No “federal reporter” collects the judgments of all federal agencies and puts them together in published volumes or online.<sup>104</sup> Some agencies provide various forms of information about their adjudication. For example, the National Labor Relations Board posts on the web the judgments rendered by its Administrative Law Judges;<sup>105</sup> the opinions of the Board itself are collected in an agency reporter.<sup>106</sup> The Executive Office of Immigration Review also provides statistics about asylum outcomes, with details about the nationalities of petitioners and dispositions of cases, but the materials are presented in the aggregate.<sup>107</sup>

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<sup>101</sup> 8 C.F.R. § 1003.27(a) (2005) (“[T]he Immigration Judge may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public . . .”).

<sup>102</sup> *Id.* § 1003.27(c) (providing that hearings involving spousal abuse may be closed); see also *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 220 (3d Cir. 2002) (upholding a blanket closing, based on national security concerns, of deportation hearings), *cert. denied*, 538 U.S. 1056 (2003). But see *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 705 (6th Cir. 2002) (finding a general closing of such proceedings to violate the First Amendment).

<sup>103</sup> 20 C.F.R. § 498.215(d) (2005) (“The hearing will be open to the public unless otherwise ordered by the ALJ for good cause.”).

<sup>104</sup> While not all circuits currently provide that their decisions can be cited as precedent, new rulemaking in the federal system requires that all such judgments be available to other litigants to cite to courts. That rule, FED. R. APP. P. 32.1, became effective in December 2006, and applies to opinions issued on or after January 1, 2007. See U.S. Courts, Federal Rulemaking, <http://www.uscourts.gov/rules> (last visited Dec. 1, 2006). However, while not all decisions were “published” in the sense that they were “citable,” many were made available, both online and in a special published reporter called the Federal Appendix, that was begun in 2001. See Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2D 259, 259 (2002).

<sup>105</sup> See NLRB, Administrative Law Judge (ALJ) Decisions, [http://www.nlr.gov/research/decisions/alj\\_decisions.aspx](http://www.nlr.gov/research/decisions/alj_decisions.aspx) (last visited Dec. 1, 2006).

<sup>106</sup> See NLRB, Board Decisions, <http://www.nlr.gov/Research/Decisions/Board%5Fdecisions> (last visited Dec. 1, 2006); NLRB, Regional Directors, [http://www.nlr.gov/Research/Decisions/regional\\_directors.aspx](http://www.nlr.gov/Research/Decisions/regional_directors.aspx) (last visited Dec. 1, 2006).

<sup>107</sup> See Executive Office for Immigration Review, Index of Frequently Requested FOIA-Processed Records, <http://www.usdoj.gov/eoir/efoia/foiafreq.htm> (last visited Dec. 1, 2006);



A few institutions outside of government collect and disseminate some materials on administrative adjudication. For example, Hastings College of Law, a part of the University of California, has a project targeted at locating and publishing immigration judges' rulings in gender-related asylum cases.<sup>108</sup> Syracuse University works in association with a group called Transactional Records Access Clearinghouse (TRAC), which collects data (in part by filing requests under the Freedom of Information Act) on several agencies.<sup>109</sup> Further, some academics, expert in administrative law, have analyzed sets of decisions or the procedures of specific agencies.<sup>110</sup>

I have called Figure 11 an "estimate" to reflect that we produced this assessment without the ability to rely on a public database that had compiled this information. Rather, through the enterprising research of talented students and the advice of colleagues who teach administrative law, we sifted through disparate data sets to compile these materials.<sup>111</sup> Unlike the federal courts, served by an Administrative Office that routinely collects and collates national data, federal administrative agencies have no shared research division that spans the dozens of entities and that supplies the public with annual booklets detailing their work. In its absence, researchers need to go agency by agency. In the 1970s, Congress did create the Administrative Conference of the United States (ACUS), designed to provide some interagency analysis.<sup>112</sup> But Congress never funded ACUS at a level that would have permitted it to survey and report regularly on all of the adjudicatory practices of agencies; more recently, Congress has not funded ACUS at all.<sup>113</sup>

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see also EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS: FY 2005 ASYLUM STATISTICS (2006), available at <http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf>.

<sup>108</sup> See Ctr. for Gender & Refugee Studies, U.S. and International Case Law, <http://cgrs.uchastings.edu/law> (last visited Dec. 1, 2006).

<sup>109</sup> See TRAC, About Us, <http://trac.syr.edu/aboutTRACgeneral.html> (last visited Dec. 1, 2006); see also E-mails between Natalie Ram, Research Assistant, David Burnham, Co-Director, TRAC, and Linda Roberge, Senior Research Fellow, TRAC (Oct. 16-17, 2006) (on file with author).

<sup>110</sup> See generally JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); JERRY L. MASHAW, CHARLES J. GOETZ, FRANK I. GOODMAN, WARREN F. SCHWARTZ, PAUL R. VERKUIL & MILTON M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978); Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731 (2003).

<sup>111</sup> Thanks are owed to Jennifer Peresie, Natalie Ram, and Bertrall Ross, who did so, assisted by advice from administrative law experts Michael Asimow, Steven Croley, Gene Fidell, Jeffrey Lubbers, Elizabeth Magill, Jerry Mashaw, and from Yale Law School librarian Camilla Tubbs. See Ram & Ross, *supra* note 98.

<sup>112</sup> See Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964).

<sup>113</sup> See Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 90 (1998).

Yet what occurs within agencies is relatively visible when compared with another form of ADR, exemplified by an excerpt from my own 2002 Cellular Service Agreement, pictured on the next two pages. (The provider advised me to keep the document in a safe place, and I comply with that mandate by regularly sharing its contents with others.)

### Example of Cellular Phone Contract: 2002

# Your Cellular Service Agreement

Please read carefully  
before filing in a safe place.

## YOUR CELLULAR SERVICE AGREEMENT

This agreement for cellular service between you and [your] wireless [company] sets your and our legal rights concerning payments, credits, changes, starting and ending service, early termination fees, limitations of liability, settlement of disputes by neutral arbitration instead of jury trials and class actions, and other important topics. PLEASE READ THIS AGREEMENT AND YOUR PRICE PLAN. IF YOU DISAGREE WITH THEM, YOU DON'T HAVE TO ACCEPT THIS AGREEMENT.

IF YOU'RE A NEW CUSTOMER, THIS AGREEMENT STARTS WHEN YOU OPEN THE INSIDE PACKAGE OF ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT . . . . IF YOU DON'T WANT TO ACCEPT AND BE BOUND BY THIS AGREEMENT, DON'T DO ANY OF THOSE THINGS. INSTEAD, RETURN ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT (WITHOUT OPENING THE INSIDE PACKAGE) TO THE PLACE OF PURCHASE WITHIN 15 DAYS.

IF YOU'RE AN EXISTING CUSTOMER UNDER A PRIOR FORM OF AGREEMENT, YOUR ACCEPTING THIS AGREEMENT IS ONE OF THE CONDITIONS FOR OUR GRANTING YOU ANY OF THE FOLLOWING CHANGES IN SERVICE YOU MAY REQUEST: A NEW PRICE PLAN, A NEW PROMOTION, ADDITIONAL LINES IN SERVICE, OR ANY OTHER CHANGE WE MAY DESIGNATE WHEN YOU REQUEST IT (SUCH AS A WAIVER OF CHARGES YOU OWE). . . . YOU CAN GO BACK TO YOUR OLD SERVICE UNDER YOUR PRIOR AGREEMENT AND PRICE PLAN BY CONTACTING US ANY TIME BEFORE PAYING YOUR FIRST BILL AFTER WE MAKE THE CHANGE YOU REQUESTED. OTHERWISE, IF YOU PAY YOUR BILL, YOU'RE CONFIRMING YOUR ACCEPTANCE OF THIS AGREEMENT. IF YOU DON'T WANT TO ACCEPT THIS AGREEMENT, THEN DON'T MAKE SUCH A CHANGE AND WE'LL CONTINUE TO HONOR YOUR OLD FORM OF AGREEMENT UNLESS OR UNTIL YOU MAKE SUCH A CHANGE. . . .

### Example of Cellular Phone Contract: 2002 (cont.)

#### **INDEPENDENT ARBITRATION**

INSTEAD OF SUING IN COURT, YOU'RE AGREEING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE'S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission.) YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW:

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER WIRELESS INDUSTRY ARBITRATION ("WIA") RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU. . . .

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claim arising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS. In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an issue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators.

(4) IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;

(5) NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.

Figure 12

At the time, I had decided to expand my phone service. As the agreement reproduced here indicates, by unwrapping the phone and activating the new service, I waived my rights to go to court and became obligated to "arbitrate disputes arising out of or related to" this or "prior agreements." Further, both

the provider and I agreed to waive our rights to pursue any “class action or class arbitration.” (I do not know how often cell phone providers bring class actions against their own consumers. This purported symmetry is an amusing feature of this form contract that I in fact attempted, unsuccessfully, to renegotiate.) Instead of whatever public remedies might be available, I was required to use the dispute resolution service stipulated by the phone provider, which did not detail what costs might be charged to me.<sup>114</sup>

As was the case for the expanding authority of magistrate and bankruptcy judges, discussed above and detailed earlier through Figures 3, 4, and 5, neither the growth of administrative adjudication nor the mandatory-arbitration provisions in Figure 12 could have existed without statutory innovations and judicial interpretation. In 1925, Congress enacted the United States Arbitration Act, recognizing arbitration contracts as enforceable obligations.<sup>115</sup> As is also familiar, in 1946, Congress enacted the Administrative Procedure Act (APA), relying heavily on agency decision making as an alternative to adjudication.<sup>116</sup> But even then, federal courts were not prepared to provide final authority to such agency decisions, nor did they always enforce agreements that were entered *ex ante* and that waived access to courts in favor of arbitration. Judges objected to doing so because they saw arbitration as too flexible, too lawless, or too informal. They contrasted it with adjudication, praised for its regulatory role in monitoring adherence to national norms.<sup>117</sup>

However, in the 1980s the Supreme Court reversed earlier rulings and enforced arbitration contracts, even when federal statutory rights were at stake,<sup>118</sup> and even when state law might permit adjudication.<sup>119</sup> Instead of

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<sup>114</sup> Although some have argued that a failure to specify costs ought to be grounds for the unenforceability of mandatory arbitration clauses entered into prior to the occurrence of disputes, the Supreme Court has concluded that the burden rests on the party challenging a particular procedure to establish that the costs imposed prevent that person from effectively vindicating federal statutory rights. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

<sup>115</sup> *See* The United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2000)). The current version is commonly referred to as the Federal Arbitration Act (FAA).

<sup>116</sup> *See* Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559 (2000)).

<sup>117</sup> *See, e.g., Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). *See generally* Resnik, *Many Doors, Closing Doors*, *supra* note 78.

<sup>118</sup> *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

<sup>119</sup> *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10-14 (1983). This approach has prevailed. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that the FAA applies to employment contracts except as specified in the FAA’s text). On remand, the Ninth Circuit concluded that, under California law, the contract was

objecting to the informality of arbitration, judges praised its flexibility. Importantly, judges also argued that arbitration was similar to adjudication, now reconfigured as just one of several techniques appropriate for the resolution of disputes. As long as the alternatives permit an adequate means to vindicate federal statutory rights, contracts entered into before a dispute arises are enforceable. Moreover, interpretations of such contractual provisions are now generally sent, for a first consideration, to arbitrators. In 2006, the Supreme Court reiterated this approach in *Buckeye Check Cashing, Inc. v. Cardegna*.<sup>120</sup> Although the Florida Supreme Court had held an arbitration provision unenforceable because the underlying contract had a provision which, under Florida law, was invalid and non-severable,<sup>121</sup> the U.S. Supreme Court ruled that the issue of the contract's enforcement was one that had to be first presented, under federal law, to the arbitrator.<sup>122</sup>

In short, courts send contracting parties, such as employees and consumers, to mandatory arbitration programs created by employers, manufacturers, and providers of goods and services. At these proceedings, attendance of "observers" is either presumptively prohibited<sup>123</sup> or is at the option of parties and the arbitrator. Under some dispute resolution providers' rules, if members of the media are permitted to attend, they generally may not record the proceedings.<sup>124</sup>

Concepts of "rights to sue" in public fora have given way to enforcement of obligations to use alternatives, many of which do not allow for aggregate

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unenforceable because it was a contract of adhesion. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002).

<sup>120</sup> 126 S. Ct. 1204 (2006).

<sup>121</sup> *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 862-64 (2005).

<sup>122</sup> *Buckeye Check Cashing*, 126 S. Ct. at 1209; see also *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (finding that the question of whether an arbitration contract precluded a class arbitration was an issue to be determined initially in arbitration rather than in court).

<sup>123</sup> See, e.g., Am. Arbitration Ass'n, Wireless Industry Arbitration Rules (July 1, 2003), <http://www.adr.org/sp.asp?id=22010> (providing in rule twenty-four that "[t]he arbitrator shall ensure the privacy of the hearings"). The Better Business Bureau's "Arbitration Rule 14" permits outside observers to attend as long as there is "room and no objection" from either the parties or the arbitrator. Better Bus. Bureau Dispute Resolution, Binding Arbitration 2006, <http://www.dr.bbb.org/ComSenseAlt/bindArb.asp> (last visited Dec. 1, 2006).

<sup>124</sup> See Better Bus. Bureau Dispute Resolution, Binding Arbitration 2006, *supra* note 123 (stating in its "Rule 15" that "[u]nless there is approval of all parties and the arbitrator, neither media representatives nor any other observer may be permitted to bring cameras, lights, recording devices or any other equipment into the hearing"). Further, the media's attendance is contingent upon the consent of the arbitrator and the parties. *Id.* Where the requisite consent is obtained, "[m]edia shall be permitted access to arbitration hearings on the same basis as other observers." *Id.*

processing nor require public disclosure of decisions rendered.<sup>125</sup> One can see the pace of change by looking at Figure 13, which shows excerpts from the 2006 version of a cell phone contract, available on the web. The 2002 clause, “Independent Arbitration,” has been relabeled “Dispute Resolution and Mandatory Arbitration” and asserts that no class arbitrations will be permitted – even if the American Association of Arbitration (AAA), one of the institutions to which disputes are sent, provides for them in the AAA rules.<sup>126</sup> All of these innovations put dispute resolution *outside* courthouses, but their enforcement relies on doctrine generated *within* courts and legislatures governing the interpretation of such consumer and employee contracts.

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<sup>125</sup> The parameters of what kinds of procedures, in terms of the kinds of information in contracts mandating arbitration and in terms of the kinds of costs and the procedural opportunities that suffice to preclude litigation, remain a source of litigation. *See, e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (placing the burden of proof on opponents of arbitration to show that its costs make it an inadequate substitute for statutory rights). That ruling has resulted in some lower courts permitting discovery into the costs to be imposed in a particular program. *See, e.g.*, *James v. McDonald's Corp.*, 417 F.3d 672, 680 (7th Cir. 2005) (requiring courts to apply “a case-by-case analysis” focusing in part on the claimant’s “ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims” (citation omitted)); *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003) (adhering to a case-by-case approach to the validity of arbitration costs); *Bess v. Check Express*, 294 F.3d 1298, 1303 (11th Cir. 2002) (vacating and remanding a district court denial of a motion to compel arbitration because the district court failed to make case-specific findings concerning the costs of arbitration); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002) (remanding for limited discovery on the costs of arbitration); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (permitting the plaintiff on remand to renew claims concerning fee-sharing provisions and costs of arbitration); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 708 (D.C. Cir. 2001) (finding that the plaintiff failed to carry her burden in the district court of showing that the costs of arbitration would be sufficiently burdensome as to be invalid).

<sup>126</sup> Verizon Wireless eStore, Your Verizon Wireless Customer Agreement, [http://www.vzwshop.com/pops/customeragreement\\_popup.aspx](http://www.vzwshop.com/pops/customeragreement_popup.aspx) (last visited Dec. 1, 2006) (“THIS AGREEMENT DOESN’T PERMIT CLASS ARBITRATIONS EVEN IF [AAA] PROCEDURES OR RULES WOULD.”). Other providers have similar limitations. *See, e.g.*, Sprint PCS Terms & Conditions, <http://www.sprintpcs.com/common/popups/popLegalTermsPrivacy.html#2> (last visited Dec. 1, 2006). On the enforcement of such provisions, see *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (enforcing arbitration clauses despite arguments by employees seeking class treatment of claims under the Age Discrimination in Employment Act and the Employee Retirement Income Security Act, as well as by employees pursuing individual claims under the Fair Labor Standards Act and Title VII); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75.

### Example of Cellular Phone Contract: 2006

#### Dispute Resolution And Mandatory Arbitration

∞ WE EACH AGREE TO SETTLE DISPUTES (EXCEPT CERTAIN SMALL CLAIMS) ONLY BY ARBITRATION. THERE'S NO JUDGE OR JURY IN ARBITRATION, AND REVIEW IS LIMITED, BUT AN ARBITRATOR CAN AWARD THE SAME DAMAGES AND RELIEF, AND MUST HONOR THE SAME LIMITATIONS IN THIS AGREEMENT, AS A COURT WOULD. IF AN APPLICABLE STATUTE PROVIDES FOR AN AWARD OF ATTORNEY'S FEES, AN ARBITRATOR CAN AWARD THEM, TOO. WE ALSO EACH AGREE, TO THE FULLEST EXTENT PERMITTED BY LAW, THAT:

- (1) THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT. EXCEPT FOR QUALIFYING SMALL CLAIMS COURT CASES, ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR ANY PRIOR AGREEMENT FOR WIRELESS SERVICE WITH US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST, OR ANY PRODUCT OR SERVICE PROVIDED UNDER OR IN CONNECTION WITH THIS AGREEMENT OR SUCH A PRIOR AGREEMENT, OR ANY ADVERTISING FOR SUCH PRODUCTS OR SERVICES, WILL BE SETTLED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR BETTER BUSINESS BUREAU ("BBB"). YOU CAN ALSO BRING ANY ISSUES YOU MAY HAVE TO THE ATTENTION OF FEDERAL, STATE, OR LOCAL GOVERNMENT AGENCIES AND THEY CAN, IF THE LAW ALLOWS, SEEK RELIEF AGAINST US ON YOUR BEHALF. . . .
- (3) YOU CAN OBTAIN PROCEDURES, RULES, AND FEE INFORMATION FROM THE AAA (WWW.ADR.ORG), THE BBB (WWW.BBB.ORG), OR FROM US. **THIS AGREEMENT DOESN'T PERMIT CLASS ARBITRATIONS EVEN IF THOSE PROCEDURES OR RULES WOULD.** IN EXCHANGE FOR YOUR AGREEMENT TO ARBITRATE ON AN INDIVIDUAL BASIS, WE'RE PROVIDING YOU A FREE INTERNAL MEDIATION PROGRAM. MEDIATION IS A PROCESS FOR MUTUALLY RESOLVING DISPUTES. A MEDIATOR CAN HELP PARTIES REACH AGREEMENT, BUT DOESN'T DECIDE THEIR ISSUES. IN OUR MEDIATION PROGRAM, WE'LL ASSIGN SOMEONE (WHO MAY BE FROM OUR COMPANY) NOT DIRECTLY INVOLVED IN THE DISPUTE TO MEDIATE. THAT PERSON WILL HAVE ALL THE RIGHTS AND PROTECTIONS OF A MEDIATOR. NOTHING SAID IN THE MEDIATION CAN BE USED IN A LATER ARBITRATION OR LAWSUIT. . . .
- (4) IF YOU REQUEST MEDIATION UNDER OUR PROGRAM, PARTICIPATE IN GOOD FAITH IN AT LEAST ONE TELEPHONIC MEDIATION SESSION, AND THE MEDIATION DOESN'T RESOLVE THE DISPUTES BETWEEN US, WE'LL PAY ANY FILING FEE LATER CHARGED YOU BY THE AAA OR BBB FOR ONE ARBITRATION OF THOSE DISPUTES. IF THAT ARBITRATION PROCEEDS, WE'LL ALSO PAY ANY FURTHER ADMINISTRATIVE AND ARBITRATOR FEES LATER CHARGED FOR IT AND (IF THE ARBITRATION AWARD IS APPEALABLE UNDER THIS AGREEMENT) ANY APPEAL TO A NEW 3 ARBITRATOR PANEL. WE MAY MAKE YOU A WRITTEN OFFER OF SETTLEMENT ANY TIME BEFORE ARBITRATION BEGINS. IF WE DO AND YOU DON'T RECOVER IN ARBITRATION MORE THAN 75% OF THE OFFERED AMOUNT, YOU AGREE TO REPAY US THE LESSER OF ANY FEES WE ADVANCED OR WHAT YOU WOULD HAVE PAID IN FEES AND COSTS IN COURT UNDER SIMILAR CIRCUMSTANCES.
- (5) ANY ARBITRATION AWARD MADE AFTER COMPLETION OF AN ARBITRATION IS FINAL AND BINDING AND MAY BE CONFIRMED IN ANY COURT OF COMPETENT JURISDICTION. AN AWARD AND ANY JUDGMENT CONFIRMING IT ONLY APPLIES TO THE ARBITRATION IN WHICH IT WAS AWARDED AND CAN'T BE USED IN ANY OTHER CASE EXCEPT TO ENFORCE THE AWARD ITSELF.
- (6) **IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, OR A CLAIM PROCEEDS IN SMALL CLAIMS COURT, WE EACH WAIVE ANY TRIAL BY JURY.**

Figure 13

### III. THE PROSPECTS: A DECLINING SET OF PUBLIC PROCESSES

A brief summary is in order as a predicate to the conclusion. During the course of the late nineteenth and twentieth centuries, democratic principles of equality, eventually embraced by federal and state officials in all branches of government, made a host of persons eligible to pursue justice. Moreover, in

shaping a national agenda, Congress repeatedly turned to adjudication as one mechanism by which to enforce many of its policies. These conditions produced intertwined narratives of adjudication's flowering and then of its wilting.

Turning to what the twenty-first century might produce, I have little confidence that those of us able to pursue rights through public processes will continue to enjoy that status. About thirty years ago, as a consumer of goods and services and as an employee, the form contracts that I signed imposed fewer bars to courts than they do now. Further, had I filed a federal lawsuit, I would not have been greeted by a judge insistent that I explore alternatives to adjudication.<sup>127</sup>

While "bargaining in the shadow of the law" is a phrase often invoked,<sup>128</sup> bargaining is increasingly a requirement *of the law* of conflict resolution. To implement that proposition, rulemakers (both legislative and judicial) have reformatted process inside courts and sent disputants outside of courts. As a consequence, the distinctive character of adjudication as a specific kind of "social ordering" to be contrasted with others (such as contracts and elections, to borrow Lon Fuller's terminology and categories)<sup>129</sup> is diminishing.

Until recently, court-based adjudication had particular and peculiar boundaries. The due process framework of civil and administrative processes, modeled after mandates for criminal trials, facilitated public engagement with norm development. That framework, however, is being superseded by one privileging consent as the preferable modality for conflict resolution. *Due process procedure*, which dominated the era between the 1930s and the 1970s, is now being supplanted by a model more aptly described as *contract procedure*,<sup>130</sup> in which the focus (both in criminal and civil cases) is on how to achieve resolution without or with little adjudication. Ex ante, contracts to forego court procedures are commonplace. Ex post, if settlements are achieved and conflicts reemerge, the dispute often focuses on how to interpret the bargains made.

Further, in the subset of disputes that do involve government-based evidentiary hearings, the majority within the federal system take place in agencies. In this context, there are few opportunities for public observation and few resources committed to dissemination of the judgments rendered.

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<sup>127</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 384-86 (1982) (detailing the prevalence of the attitude, between the 1930s and the 1980s, that it was not appropriate for judges to promote settlement to parties, and that while settlement might be a "byproduct" of pretrial activities, it was not the court's function to press parties to settle).

<sup>128</sup> See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

<sup>129</sup> See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363 (1978) (posthumously published essay based on materials written in the late 1950s).

<sup>130</sup> For further discussion, see generally Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).



Despite growing numbers of persons who use the title “judge” and conflicts called “cases,” it is increasingly rare for state-empowered actors to be required to reason in public about their decisions to validate one side of a dispute.

Three explanations are commonly proffered. A first is backlash: that proverbial defendants, opposed to being required through litigation to respond to claims of wrongdoing and to divulge information about their practices, have successfully intervened to revamp the “rules.”<sup>131</sup> A second is an overburdened docket, resulting in pressures that required retrenchment on access.<sup>132</sup> A third is expense: that abundant process opportunities exploited by overpaid lawyers have over-priced adjudication.<sup>133</sup>

While all of these are contributing factors, more is required to explain the retreat from adjudication. Given the equality of opportunities within adjudication, one might have thought it would have generated too many supporters to permit retrenchment. Further, the marketplace of lawyers and judges remains robust, and these interest groups’ livelihoods depend on helping others navigate the law’s obligations. Moreover, “the trial” continues to be a central device in popular films and television shows. Broadcast images of trials gave many people a sense of law’s presence and on occasion have prompted people to seek help from fictional judges. Social scientists report that law is very much a part of popular consciousness, and survey data document widespread commitments by Americans to rule-of-law ideology.<sup>134</sup>

Reflection is therefore required on why adjudication’s proponents were unable to marshal more societal commitments to make true its promises of fair

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<sup>131</sup> Marc Galanter’s now classic explanation of why the “haves come out ahead” is apt: repeat players, with the ability and resources, and now with the personnel in Congress and in the federal courts, have been able to “play” for new rules, limiting the reach of adjudication that some defendants found too effective in curbing their prerogatives. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

<sup>132</sup> See, e.g., Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals To Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 768-73 (1989) (advocating a system of discretionary access to the federal courts).

<sup>133</sup> See Kravitz, *supra* note 90, at 15-16 (discussing the costs of the indeterminacy of legal rules and the risks of unpredictable outcomes); see also King, *supra* note 76, at 672-73 (describing a “flight from the system,” in part because the settlement-focused federal rules, with their “heavy emphasis . . . on positioning the case so that settlement is facilitated and trial is avoided,” burden litigants and become inefficient).

<sup>134</sup> See generally James L. Gibson, Changes in American Veneration for the Rule of Law, Remarks at the DePaul University College of Law 12th Annual Clifford Symposium on Tort Law and Social Policy: Is the Rule of Law Waning in America? (Apr. 20-21, 2006) (conference materials on file with author); Tom R. Tyler, Does the American Public Accept the Rule of Law?: The Findings of Psychological Research on Deference to Authority, Remarks at the DePaul University College of Law 12th Annual Clifford Symposium on Tort Law and Social Policy: Is the Rule of Law Waning in America? (Apr. 20-21, 2006) (conference materials on file with author) [hereinafter Tyler, Deference to Authority].

and dignified treatment for individuals seeking official judgments about alleged harms. My analysis of additional factors does not rest on adjudication's laurels but rather questions some of the premises and approaches of the leaders who shaped the decades in which *due process procedure* came to dominate the landscape.

Reflecting back on lawmaking in the twentieth century, one can see the construction of the edifice of adjudication with a thin layer of highly visible and well-equipped life-tenured federal judges at its top. Over time, a corporate structure developed, with policy setting by the Judicial Conference, the Administrative Office, the Federal Judicial Center, and many committees. For several decades, efforts were focused on building the federal judiciary's capacity to welcome rights seekers.<sup>135</sup> From the New Deal through Warren Burger's appointment as Chief Justice in 1969, judges schooled each other (through rulemaking, in conferences, and by shaping doctrines in case law) about ways to enable access to courts. Further, as these life-tenured judges enjoyed the relative luxury of their constitutionally protected independence and as their jurisdiction extended (at the appellate levels) beyond the boundaries of any one state, they took the national stage in debates about race, personal liberties and freedom, and economic well-being.

The development of a national bar and of national law schools teaching about "the federal courts," and the issuance of many judgments in areas of compelling concern, put federal judges in a position to overshadow their counterparts in state courts. The phrase "don't make a federal case out of it" became a part of common parlance only in the 1950s, and while that expression warns against making too much of something,<sup>136</sup> it also acknowledges that being a "federal case" is a recognition of a matter's importance.

But as those lawyers, law professors, and judges built more opportunities for adjudication, they also built a class system for its use. As early as the 1920s,

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<sup>135</sup> See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1599-1601 (2006) [hereinafter Resnik & Dilg, *Limiting the Powers and the Term of the Chief Justice*]. Prisoner litigation, generally entailing filings by unrepresented litigants, is an exception. As early as the 1940s, as federal prison populations rose, judges reported themselves overburdened by such cases and sought ways to limit access. Yet during the 1960s and 1970s, even though federal judges worried about having too many cases, they recognized more claims of right to be cognizable on habeas corpus and also concluded that certain conditions of confinement in prisons violated various aspects of the U.S. Constitution. See generally Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 874-920 (1984); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

<sup>136</sup> See ERIC PARTRIDGE, A DICTIONARY OF CATCH PHRASES 52 (1977) (defining the phrase to mean, "[d]on't exaggerate the importance of something," and dating it from about 1950); DICTIONARY OF AMERICAN SLANG 179-80 (Harold Wentworth & Stuart Berg Flexner eds., 2d supplemented ed. 1975) (citing the phrase's use in 1957 and giving a similar definition).

Felix Frankfurter and James Landis objected that too many “petty” criminal cases reduced the prestige of the federal courts.<sup>137</sup> Beginning in the late 1950s, the Judicial Conference started to support the allocation of certain kinds of cases – labor disputes, veterans’ claims, and those involving inter-child support and custody orders – to fora other than their courts.<sup>138</sup> And by the 1980s and 1990s, federal judges were the leading proponents of keeping their own ranks small; thus they ensured that various potential claimants would be routed to lower-status judges.<sup>139</sup>

Moreover, as individuals who were suspicious of adjudication’s utility gained federal judgeships and leadership positions, the official organs of the federal judiciary proposed reformatting and outsourcing adjudication. Through rulemaking, the federal judiciary sought to curb lawyers and promote settlement. The revised rules and a good deal of case law have produced a profoundly anti-adjudication rhetoric, coming in large measure from individuals who are judges themselves.<sup>140</sup> Working in close proximity with lawyers (and to a much lesser extent with litigants), many jurists found fault with the processes of adjudication that they used on a daily basis.<sup>141</sup> Not only has there been some “flight” from the federal system (to borrow a term from Judge Carolyn Dineen King, who served as the Chief Judge of the Fifth Circuit and who chaired the Executive Committee of the Judicial Conference),<sup>142</sup> potential litigants have also intentionally been routed elsewhere.

In the decades following the appointment of Warren Burger as Chief Justice, leaders of the federal judiciary began to use collective mechanisms of administration and their powers as adjudicators to alter the scope of the “business in the courts of the United States.”<sup>143</sup> They sought to influence

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<sup>137</sup> See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 251 (1928); see also Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 980-82 (1926) (arguing that Article III judges were not required to try “petty” criminal cases in the federal system).

<sup>138</sup> The details of this shift are mapped in Resnik, *Trial as Error*, *supra* note 15, at 965-68.

<sup>139</sup> See, e.g., William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, D.C.), Jan. 1992, at 1, 2 (“[A] federal judiciary rising above 1,000 members will be of lesser quality and could be dominated by a bureaucracy of ancillary personnel.”); see also Resnik, *Trial as Error*, *supra* note 15, at 983-96.

<sup>140</sup> See generally Stephen C. Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 229 (documenting the growth in recent decades of judicial control over rulemaking).

<sup>141</sup> See generally Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981).

<sup>142</sup> King, *supra* note 76, at 673.

<sup>143</sup> 28 U.S.C. § 331 (2000); see also *supra* note 38 and accompanying text. The terms of this statute are analyzed in Resnik, *Constricting Remedies*, *supra* note 87, at 280.

congressional decisions about whether to create more rights and enable more litigants to enter federal courts. During earlier parts of the twentieth century, the federal judiciary (acting through the Judicial Conference) generally took the position that many proposed bills were matters of “legislative policy” about which the judiciary, in a corporate voice, ought not to comment.<sup>144</sup> A few exceptions to this approach can be found in those decades. Beginning in the 1950s, the Judicial Conference selectively raised concerns that its docket pressures made the addition of new sets of litigants problematic. Yet at the same time, the Conference took no position on major pieces of legislation – such as the 1960s civil rights bills – that expanded access to the federal courts. Further, the Judicial Conference supported efforts to eliminate the amount-in-controversy requirements attached to general federal question jurisdiction and thereby to facilitate filings of those relying on that provision for access.<sup>145</sup>

The appointment of Warren Burger as Chief Justice marks the more profound change. As one commentator explained, Chief Justice Burger introduced a form of activism into that role; he sought to be a leader of law reform in both federal and state systems in a fashion “broader than anything in the nation’s judicial experience.”<sup>146</sup> Chief Justice Burger pressed for more ADR and less federal jurisdiction. Although his successor, William Rehnquist, had a very different leadership style, the two shared many policy goals.<sup>147</sup> By century’s end, leaders of the federal judiciary had moved to the front lines, arguing to Congress that it should not create rights in federal courts for consumers, for veterans, or for victims of violence based on gender.<sup>148</sup> While

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<sup>144</sup> See Resnik, *Trial as Error*, *supra* note 15, at 960-67. On the importance of the role played by the Chief Justice, see Resnik & Dilg, *Limiting the Powers and the Term of the Chief Justice*, *supra* note 135, at 1599-1618.

<sup>145</sup> See Resnik, *Trial as Error*, *supra* note 15, at 981-85. For example, under Earl Warren’s leadership, the Judicial Conference proposed some limits by imposing new requirements for those seeking federal court jurisdiction based on diversity of citizenship, but also supported expanding access to claimants who had not theretofore been able to proceed in federal court. Specifically, the Conference supported the American Law Institute’s proposal to eliminate the amount in controversy (then \$10,000) that a person making a claim “arising” under federal law had to meet. See 1971 JUD. CONF. REP. 79; 1973 JUD. CONF. REP. 48; AM. LAW INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 172-76 (1969).

<sup>146</sup> William F. Swindler, *The Chief Justice and Law Reform, 1921-1971*, 1971 SUP. CT. REV. 241, 264; see also Arthur R. Landever, *Chief Justice Burger and Extra-Case Activism*, 20 J. PUB. L. 523, 523 (1971).

<sup>147</sup> The agendas and influence of both Chief Justices are detailed in Resnik, *Constricting Remedies*, *supra* note 87, at 224-31, 256-70, 272-81; Resnik & Dilg, *Limiting the Powers and the Term of the Chief Justice*, *supra* note 135, at 1599-1621; Resnik, *Trial as Error*, *supra* note 15, at 981-85.

<sup>148</sup> See Judicial Conference of the United States, Long Range Plan for the Federal Courts (Dec. 1995), reprinted in 166 F.R.D. 49, 83-89 (1996) (recommendations 1-6); see also Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the*

Congress did not have to respond, some of the judicial protests succeeded, and some types of claimants were sent away from the prestigious and highly visible federal courts to other venues.

Although the term “judge” has now become attached to a mélange of decision makers in a variety of venues, the élan of “the federal judge” has not. Many such individuals work in cramped spaces, conducting proceedings in rooms that are hard to find, and rendering decisions that are never available in federal law reporters (whether electronic or in print). The general public has neither regular means to learn about what norms are being applied nor systematic ways to check for erroneous decisions. We cannot use the thousands of judgments to understand whether and how to reshape legal rules.

Some of these decision makers lack more than just resources, status, and visibility. They also lack structural protection that ensures their independence, because they can be subject to efforts by their superiors within agencies to affect their decisions. While some Administrative Law Judges (ALJs) are commissioned through the Administrative Procedure Act, which constrains the ability of executive officials to alter their employment conditions, many are “hearing officers,” “presiding judges,” or “administrative judges” who are line employees of agencies, subject to reassignment or other influences.<sup>149</sup> A contemporary example comes from efforts by one Attorney General of the United States to treat “immigration judges” as ordinary employees of the Department of Justice and reassign them.<sup>150</sup> Moreover, as criticisms have emerged about sadly deficient proceedings and rulings by immigration judges in cases where individuals seek asylum,<sup>151</sup> some life-tenured judges have

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*Violence Against Women Act*, 74 S. CAL. L. REV. 269, 269-70 (2000); Resnik, *Trial as Error*, *supra* note 15, at 949-99.

<sup>149</sup> See, e.g., Act of Nov. 29, 1999, Pub. L. No. 106-113 app. C, § 124, 113 Stat. 1501, 1501A-160 (permitting Indian Probate decisions to be made by non-APA judges in response to backlog). See generally Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 321 (2002); Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, JUDGES’ J., Summer 1999, at 16.

<sup>150</sup> Before the Immigration Service became a part of the Department of Homeland Security, Attorney General John Ashcroft proposed reassigning a number of immigration judges, who are not chartered through the Administrative Procedure Act. See Lisa Getter, *Immigration Judges Call for Independent Court*, L.A. TIMES, Jan. 31, 2002, at A1; see also *Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 107th Cong. app. at 57-62 (2002) (statement of Dana Marks Keener); *id.* app. at 62-66 (position paper of the National Association of Immigration Judges).

<sup>151</sup> See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (describing many cases that criticized the Board of Immigration Appeals; those criticisms included that the Board was “not aware of the most basic facts” or a decision was “totally unsupported by the record” or an “unexplained conclusion” was “hard to take seriously” (citations omitted)); see also Nina Bernstein, *New York’s Immigration Courts Lurch Under a Growing*

responded by complaining about the resultant imposition on their own court system (because of the burdens of appeals requiring close scrutiny of records) rather than by calling for a greater commitment of time by Article III judges to those sets of cases.<sup>152</sup>

More generally, the leaders of the federal judiciary have rarely used their clout in either the roles of adjudicator or of administrator/lobbyist to export their material privileges, such as large and often grand courtrooms, higher salaries, law clerks, smaller caseloads, and their constitutional protections of independence, to those with fewer resources. Rather, life-tenured judges – most famously Warren Burger – have opposed conferring life tenure on these “other” judges and have insisted on maintaining status hierarchies even as they support the expansion of the roles and responsibilities of non-life-tenured judges.<sup>153</sup>

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*Burden*, N.Y. TIMES, Oct. 8, 2006, at A1; Rachel L. Swarns, *Study Finds Disparities in Judges' Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A15.

<sup>152</sup> The workload problem is discussed in *Benslimane*:

In the [space of one] year . . . different panels of this court reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. . . . Our criticisms of the Board and of the immigration judges have frequently been severe. . . .

This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice. . . . [It] is clear [that this state of affairs] cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation's immigration laws . . . , and that the power of correction lies in the Department of Homeland Security . . . and the Department of Justice . . . .

*Benslimane*, 430 F.3d at 829-30 (citations omitted); see also Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, at A1 (reporting that “[j]urists, legal scholars and immigration lawyers interviewed argued that the BIA reforms have come at the expense of the nation's circuit courts” and that “[t]he BIA's reliance on one-sentence opinions has forced circuit courts to spend more time researching and deliberating the immigration cases that come to them”). The Judicial Conference has called for Congress to provide more resources for the administrative process.

<sup>153</sup> See Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 74-94 (1996). Indeed, the leadership of the life-tenured judiciary opposed the suggestion that administrative hearing officers be given the title of “administrative law judge,” and then objected again when magistrates gained the appellation “magistrate judge.” See Resnik, *Trial as Error*, *supra* note 15, at 986-90. Further, Justice Scalia has complained that, while the federal docket was once “substantially exotic” with “a touch of the mundane,” it is being taken over by more ordinary cases. See Justice Antonin Scalia, Address Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987), in 34 FED. B. NEWS & J. 252, 252 (1987). That assessment is, as a factual matter, inaccurate, as demonstrated by Professor Marc Galanter's

Thus far, I have used the federal judiciary as the baseline because it is better resourced than its state and agency counterparts on measures such as size of docket, staff per judge, physical space, and salaries. But the federal judiciary has regularly complained – and now does so more insistently – that it too has been shortchanged and that appropriations for its services fall below its needs. One longstanding concern has been that judicial salaries are small as compared to what lawyers are paid in the private market. As a 1926 congressional report put it: “Is our Federal judiciary – one of the three coordinate branches of the National Government – so contemptible and so unimportant that we shall refuse to pay them the reasonable compensation of an average good lawyer?”<sup>154</sup> Chief Justices have repeatedly echoed that sentiment many times since (beginning with Chief Justice Warren Burger), as they provided annual “state of the judiciary” speeches.<sup>155</sup>

More recently, spokespersons for the federal judiciary and a few concerned members of Congress have resorted to the language of “crisis” when discussing their general budgets.<sup>156</sup> According to Judge King who, as noted, chaired the Judicial Conference’s Executive Committee, with “the advent of soaring federal budget deficits, the size of the increase” in funds for the federal judiciary declined, resulting in a “shortfall” that caused the elimination of staff positions.<sup>157</sup> Further, about a fifth of the judiciary’s 5.4 billion dollar budget is allocated for rent, paid to the General Services Administration (GSA) for the use of courthouse facilities and in turn by the GSA to support new building.<sup>158</sup> Judge King noted that, unlike some parts of government, the judiciary

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comparative assessment of dockets. See Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 921-24. That some form of bureaucracy is needed for the multiplying numbers of judges does not decide the question of the contours. See generally Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); Patrick E. Higginbotham, *Bureaucracy – The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766 (1983).

<sup>154</sup> REP. GRAHAM, SALARIES OF JUDGES, H.R. REP. NO. 69-232, at 5 (1926).

<sup>155</sup> See, e.g., William H. Rehnquist, *2004 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, D.C.), Jan. 2005, at 1, 2 [hereinafter Rehnquist, *2004 Year-End Report*], available at <http://www.uscourts.gov/ttb/jan05ttb/2004/index.html> (“As the Judiciary’s workload continues to grow, the current budget constraints are bound to affect the ability of the federal courts efficiently and effectively to dispense justice.”); John G. Roberts, *2005 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, D.C.), Jan. 2006, at 1, 2, available at <http://www.uscourts.gov/ttb/jan06ttb/yearend/index.html> (stating that “failure to raise judges’ pay” is a “direct threat to judicial independence”).

<sup>156</sup> See, e.g., Rehnquist, *2004 Year-End Report*, *supra* note 155, at 1.

<sup>157</sup> See King, *supra* note 76, at 663 (stating that “we lost 1,350 staff positions, or 6% of our court staff”).

<sup>158</sup> *Id.* at 662-64.

continued to receive budgetary increases that averaged about 4.5 percent a year. Nonetheless, she concluded that the federal judiciary had a “terrible financial problem” given the increased rate of expenses at about 6 to 7.5 percent a year.<sup>159</sup> And again, while my exemplar has been the federal system, these problems are all the more acute in many states, a few of which have had to suspend court services temporarily because of a lack of funding.<sup>160</sup>

As the market for adjudicatory services expanded (in terms of demand and supply) and as it diversified (in terms of the kinds of disputes eligible for legal resolution, the range of tasks for third parties, the kinds and quality of processes provided, and the remedies envisioned), choices emerged about which disputes deserved what form of process. Many of those choices have been left to a small cadre of members of Congress, judges, and lawyers who, again in the language of political economy, have a set of incentives shaped by their own situations. They have developed a hierarchy of adjudicators, and they have relegated low-status litigants to low-status judges. Further, they have been unable to generate widespread commitments to fund adequately all sectors of the judicial workforce. Now, federal judicial leaders are concerned that they have failed to garner sufficient support for their own budgets.

Whatever the possibilities for politicians and the general problems of financing a host of public sector services, life-tenured judges had an alternative – at least in terms of what they could have understood the U.S. Constitution to require. They could have insisted, in their judgments assessing the legality of innovations creating magistrate, bankruptcy, and administrative judgeships, that, as a matter of the interpretation of Article III of the Constitution and the Due Process Clauses of the Fifth and Fourteenth Amendments, any devolution of authority had to be accompanied by a devolution of constitutional attributes of structural protection for judicial judgments and of constitutional opportunities for public adjudication. Article III judges could have imposed constitutional requirements – independence, public access to proceedings, reasoned and public explanations of outcomes – to protect and to make visible the exercise of the powers of federal adjudication that were being relocated to these “other” judges. Moreover, as five decades of changing case law interpreting federal statutes related to arbitration demonstrates, Article III judges need not have federalized so many contracts relating to arbitration and could have constrained arbitration’s use. Of course, legislators could also have

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<sup>159</sup> *Id.* at 664.

<sup>160</sup> More than half of the administrators of state courts reported inadequate funding, and often described the problems as a “fiscal crisis.” Several cut staff, limited prosecutions, and did not provide assistance to certain kinds of litigants. See Daniel J. Hall, Robert W. Tobin & Kenneth G. Pankey Jr., *Balancing Judicial Independence and Fiscal Accountability in Times of Economic Crisis*, JUDGES’ J., Summer 2004, at 5, 5-7. These problems reach back more than a decade. See generally ABA SPECIAL COMM’N ON FUNDING THE JUSTICE SYS., FUNDING THE JUSTICE SYSTEM: A CALL TO ACTION (1992); Don J. DeBenedictis, *Facing the Justice Deficit*, A.B.A. J., Oct. 1992, at 109.



intervened to equip the democratic administrative state with judges sufficient to the volume of adjudicatory work.

Those who viewed the status of rights holder as widely enjoyed and enforced through adjudication did not produce constituencies sufficient to support that project. In contrast, those holding the attitude that court-based adjudication ought to be curbed have prevailed, at least so far. Access to courts is being limited, as conflicts are reallocated to lower echelon public officials with fewer resources and to the private sector.

Moreover, shifts in courts' dockets have also highlighted the "big" case as the centerpiece of adjudication. As large-scale litigation came to the fore, coupled with high-profile litigation against the government or involving large sums of money, many life-tenured judges became restless with the ordinariness of other cases and became reluctant to invest time and resources in them. Adjudication's proponents in the academy have also been a part of the story of adjudication's eclipse. By overstating the proportions of the job of judging, they helped to create expectations the work did not often meet. Adjudication's proponents failed to underscore the importance of judicial decisions in the lives of a diverse group of litigants, and the desirability of this form of public sector work. Through the emulation of "the Federal Courts" as the centerpiece of justice, the heroic aspects of the ordinary work of all levels of judges went unseen, though judges were deeply affecting people by their rulings on individual questions.

In sum, and in addition to factors such as backlash, docket pressures, and expense, during the expansionary era of adjudication, the focus of national elites of lawyers and judges on building the federal court system came (whether intended or not) at the expense of lower-tier institutions. As potential beneficiaries of judicial remedies were shifted to administrative processes that were both less visible and less powerful in remediating widespread injuries, opportunities to develop constituencies for adjudication's utility were missed.<sup>161</sup> Survey data indicate that, while Americans have great attachment and commitment to legal institutions, they also are distressed about the way those institutions function.<sup>162</sup>

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<sup>161</sup> Some lawyer groups continue to press for access. *See, e.g.*, Association of Trial Lawyers of America (ATLA) Press Room, Civil Justice System News, <http://www.atla.org/pressroom/facts/civiljustice/index.aspx> (last visited Dec. 1, 2006); Public Citizen, Congress Watch, Common Good's Radical Proposal To Alter the Contingency Fee System Should Be Rejected (July 18, 2003), <http://www.citizen.org/congress/civjus/attorney/articles.cfm?ID=10096> (raising objections to limiting the availability of contingency fees because of the harm to those needing assistance in bringing cases).

<sup>162</sup> Tyler, *Deference to Authority*, *supra* note 134, at 39-40.

Personal positive experiences with legal institutions can, however, generate more satisfaction.<sup>163</sup> Researchers on litigants have learned that people report wanting process to give them forms of recognition, to treat them with dignity, and to enable them to have an opportunity to be heard. The import of their problems can be marked by surroundings and by interactions with persons in authority, both of which acknowledge disputants' status as rightfully laying claim to the state's attention.<sup>164</sup> For example, one comparison among adjudication, arbitration, and court-based settlement processes (at which litigants were not regularly present) found that disputants did not report much by way of difference between arbitration and adjudication.<sup>165</sup> Those responding thought that both procedures gave them opportunities to "tell their stories" and to be heard. As a result, they preferred both adjudication and arbitration to settlement negotiations at which they were not participants. Yet, as fewer people use the well-equipped federal courts, as fewer serve on juries, appear as witnesses, or participate as litigants, the opportunities for such positive experiences decline.

A predication of continued diminution of adjudicatory possibilities comes from the current composition of both the Congress and the federal judiciary, as well as the concerted campaigns to curb the use of courts (replete with anti-trial lawyer advertisements) by private sector actors. Members of Congress and the President regularly complain about "judicial activism." President Bush has used his power to select individuals to serve as life-tenured judges, many

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<sup>163</sup> Several studies and surveys of litigant and popular responses to courts suggest that direct experiences affect these attitudes and moreover, that one need not be personally successful to perceive that the system treated people with dignity, respect, and fairness. See TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 130-38 (2002) (examining how people's personal experiences with police officers and judges influence their general opinion of legal institutions); see also Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 159-61; ABA, *PERCEPTIONS OF THE U.S. JUSTICE SYSTEM* 7 (Feb. 1999), available at <http://www.abanet.org/media/perception/perceptions.pdf>; *Panel Discussion: American Bar Association Report*, 62 ALB. L. REV. 1349, 1353 (1999) (Marilyn Golden, who conducted the ABA study, explained that "[t]hose who had positive court experiences . . . tended to have more confidence in the system"); Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts*, 82 JUDICATURE 58, 63 (1998) (reporting that a study of Wisconsin citizens, consistent with other studies, found that "general support [of the judiciary] went up in response to positive specific experiences").

<sup>164</sup> Tyler, *Deference to Authority*, *supra* note 134, at 42-43; see also TOM R. TYLER, *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 75-102 (1997) (elaborating aspects of procedural justice).

<sup>165</sup> See E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 960-67 (1990).

of whom appear to share his views.<sup>166</sup> Likewise, the Chamber of Commerce and the National Association of Manufacturers have both put judicial selection on their lists of activities as they seek to identify people who believe in the need to curb litigation and then to help those individuals gain or keep judicial power.<sup>167</sup>

Yet small countertrends can be discerned. One such example involves legislative intervention in litigation between car dealers and manufacturers. In 2002, Congress exempted one set of cases – franchise disputes involving automobile dealers and manufacturers – from having to comply with form contracts requiring arbitration of disputes.<sup>168</sup> Car dealers had the legislative clout to obtain, by statute, a means to avoid the strictures of the case law enforcing pre-dispute arbitration clauses. As the legislative history explained, other legislation had already recognized the “disparity of bargaining power between motor vehicle dealers and manufacturers”; given a dealership’s dependency on marketing a particular brand and the small number of manufacturers, those who produce automobiles had the bargaining leverage to insist on amendments to contracts, once a dealership had been established.<sup>169</sup>

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<sup>166</sup> See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067-76 (2001).

<sup>167</sup> See Jeanne Cummings, *Split Opinions: For a High Court Nominee, Business Has Its Own Agenda*, WALL ST. J., June 28, 2005, at A1 (explaining the Chamber of Commerce’s work to analyze a judicial nominee’s record as “a liability expander or a liability restrainer”). For an assessment of the concerns regarding judicial independence and elected state judges, see the chapter on state judicial independence in ABA COMM’N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997), available at <http://www.abanet.org/govaffairs/judiciary/report.html>. The Brennan Center for Justice and other non-profit organizations provide frequent “alerts” regarding the influence of private interests on judicial elections. See, e.g., DEBORAH GOLDBERG, SARAH SAMIS, EDWIN BENDER & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING POINT” – AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 24 (2004), available at <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>.

<sup>168</sup> See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028, 116 Stat. 1758, 1835-36 (2002) (codified at 15 U.S.C. § 1226 (Supp. IV 2004)); The Motor Vehicle Franchise Contract Arbitration Fairness Act, S. REP. NO. 107-266, at 2 (2002). The U.S. Chamber of Commerce opposed this measure. See *Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 24 (2000). While this congressional intervention relieves automobile dealers of enforcement of their own ex ante mandatory arbitration provisions with manufacturers, dealers may invoke such clauses in contracts with consumers. See, e.g., Donna Harris, *Arbitration Defuses Lawsuits: We Can Work It Out – Or Not*, AUTOMOTIVE NEWS, Feb. 6, 2006, at 56 (discussing the contested effectiveness of mandatory arbitration clauses).

<sup>169</sup> See The Motor Vehicle Franchise Contract Arbitration Fairness Act, S. REP. NO. 107-266, at 2-3 (describing dealers as “virtual economic captives of automobile manufacturers,” who proffer contracts on a “take it or leave it” basis).

In the 2002 legislation, Congress provided that form contracts requiring arbitration between manufacturers and dealerships would not be enforceable unless both parties agreed to waive access to courts and administrative remedies *after* disputes arose.<sup>170</sup> That provision gives bargaining power to dealerships, as it makes going to court an element about which to negotiate if settlement discussions are underway. Moreover, the legislation requires that if arbitrations are had, arbitrators must provide written explanations of the facts and law supporting the decision.<sup>171</sup> Under Federal Trade Commission rules for franchisors, settlements of “significant” claims by franchisees must be disclosed on documents promoting a franchise, thereby making information about outcomes available.<sup>172</sup> Because of these requirements, the 2002 statutory mandates for written fact-finding may have worked less of a change than such obligations would when confidentiality provisions are used to prevent dissemination of information about settlements. As of this writing, another such proposal, put forth by Senator Charles Grassley, would enable poultry farmers to be treated similarly and be freed from agreements to arbitrate disputes with agricultural conglomerates unless those agreements are entered into after conflicts emerge.<sup>173</sup>

The move away from arbitration may gain supporters from other quarters, including those who have previously promoted ADR. For example, one small study of franchise disputes found that settlements occurred more often in court than in arbitration; of the cases analyzed, seventy-five percent of those pending in courts settled before decision as contrasted with forty percent of those on the arbitration track.<sup>174</sup> Further, in that sample, franchisors won about two-thirds

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<sup>170</sup> See *id.* at 5 (asserting that most states have administrative boards that enforce motor vehicle franchise law and provide “efficient and cost-effective alternative dispute resolution systems,” in addition to court-based remedies).

<sup>171</sup> 15 U.S.C. § 1226(a)(3).

<sup>172</sup> See Edward Wood Dunham & David Geronemus, Franchise “Litigotiation”: Understanding the Interplay of Litigation/Arbitration Outcomes and Settlement Negotiation in the Resolution of Franchise Disputes, Paper Presented at the ABA Forum on Franchising 6 (Oct. 9-11, 2002) (on file with author).

<sup>173</sup> See Fair Contracts for Growers Act of 2005, S. 2131, 109th Cong. (2005). The bill, introduced first in 2003 and then reintroduced in 2005, would provide that in a livestock or poultry contract, arbitration may be used to resolve controversies only if the parties consent after disputes arise. An arbitrator would also be required to provide the parties with a written explanation of the facts and law supporting an award.

<sup>174</sup> See Dunham & Geronemus, *supra* note 172, at 12-14. These lawyers relied on the Uniform Franchise Offering Circular Guidelines, which require disclosure of litigation pending, and resolved within a ten year period to select “thirty of the 100 largest franchise systems” from which to draw a sample. *Id.* at 8. Noting that the authors were not statisticians and could not confirm the validity of reported information, they reported on 420 concluded matters, of which 57 cases were tried, in court or arbitration, to conclusion over a ten year period.

of the trials but only about one-third of the arbitrations.<sup>175</sup>

Other kinds of litigants also seem to want to have at least the option to get “back” into court, as is evidenced from contracts that both mandate arbitration and seek to confer more jurisdiction on courts to review the outcomes than is otherwise available under the FAA – thereby raising the legal question of whether parties can give such power to courts.<sup>176</sup> State judges and some lower court federal judges have also questioned the propriety of enforcing arbitration clauses and have relied on state contract doctrine of unconscionability to decline enforcement of pre-dispute arbitration clauses in contracts found to be adhesive.<sup>177</sup> Moreover, adjudication is an arm of government. Eager to demonstrate an ability to enforce their own laws, governments may also feel the loss of court-based processes as they protect their own interest in exercising power.

### CONCLUSION

I conclude with a return to where I began: the question of how to understand some of the dimensions of the future trajectory, given the century just past.

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<sup>175</sup> *Id.* at 16. The median award against losing franchisors in arbitrations was \$74,500 while the median against franchisors after jury trials was \$421,973. When franchisors won in arbitration, their damage awards averaged about \$23,000, and when they won before juries, they averaged about \$285,000. *Id.* at 18.

<sup>176</sup> See, e.g., *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001) (holding that parties may not by contract expand the scope for judicial review of arbitration awards). Compare *Hoefl v. MVL Group, Inc.*, 343 F.3d 57, 66 (2d Cir. 2003) (holding that parties “seeking to enforce arbitration awards” through the federal courts “may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliance”), with *Mactec, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005) (holding that “contractual provisions limiting the right to appeal from a district court’s judgment confirming or vacating an arbitration award are permissible” as long as the parties’ intent is “clear and unequivocal”), *cert. denied*, 126 S. Ct. 1622 (2006). See also *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 23 (1st Cir. 2005) (“[J]udicial review provisions of the FAA can be displaced only by explicit contractual language evincing the parties’ clear intent to subject the arbitration award to a different standard of review.”). On the use of contract to alter the scope of copyright law, see generally David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999).

<sup>177</sup> See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (holding that a class action waiver provision in a credit card contract was unconscionable under state law); *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 692 (Cal. 2000) (holding an arbitration agreement unconscionable unless it had some “bilateralism”); see also *Stern v. Cingular Wireless Corp.*, 453 F. Supp. 2d 1138, 1147-49 (C.D. Cal. 2006) (finding unenforceable as procedurally and substantively unconscionable an addendum sent when Cingular Wireless acquired AT&T Wireless and told the AT&T customers of new class action waivers). See generally Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).

Courthouses, such as the ones depicted in this Essay, are so familiar that we may take their existence for granted, even as architecture styles and users' needs shift their contours and size. Moreover, openness is a cornerstone (building metaphor intended) of their functioning.

This accessibility did not stem, historically, from a commitment to transparent or democratic governance. Rather, public processes were techniques to display the power of government to enforce its own laws. But when government makes patent the power to inflict the violence intrinsic in court imposition of decisions that alter the property and liberty rights of individuals, we – those outside the immediate dispute – have opportunities for understanding, legitimating, de-legitimizing, and interpreting what law means, what justice entails, and how its practices occur.

The uses of courthouses in the United States stem from an amalgam of law and culture, tradition, and ritual, shaped today not only through personal interactions but by media exposition and display. As the twenty-first century begins, with its glorious new edifices to adjudication, the size and décor of those buildings may be eerily apt. Small currents of interest in adjudication can be found: from car dealers to poultry farmers to state judges seeing the harms of adhesive contracts and government actors worrying about their own authority. Unless these trends become more prevalent, the large and distinguished new buildings of courthouses may well capture the practices of contemporary adjudication – that it is a luxury good, available for only a few, inhabiting sparsely populated and gracious buildings.